85-1181

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

VIVIAN WILDER,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an arbitration clause when contained within a written employment agreement between a domestic corporation, as employer, and a citizen of the United States, as employee, providing for employment in a foreign country, is within the purview of the federal Arbitration Act, 9 U.S.C. Sections 1, *et seq.*

2. Whether an unsuccessful initial attempt to secure arbitration pursuant to state law can preclude, because of the state doctrine of law of the case, a subsequent attempt, in the same case, to secure arbitration under federal law when the arbitration agreement is within the purview of the federal Arbitration Act, 9 U.S.C. Sections 1 *et seq.*

DESIGNATION OF CORPORATE RELATIONSHIPS

Whittaker Corporation, filing this petition for certiorari as petitioner in this proceeding, states that:

1. This is its original Designation of Corporation Relationships;

2. Whittaker Corporation is not owned by any parent corporation;

3. Whittaker Corporation does not have any subsidiaries which are not wholly owned; and

4. Whittaker Corporation does not have any affiliates.

PARTIES

The parties involved in this petition are the plaintiff and respondent, Vivian Wilder ("Wilder"), a United States citizen and a California resident, and the defendant and petitioner, Whittaker Corporation ("Whittaker"), a California corporation. A number of other present and former Whittaker employees were also initially named as defendants, though only two remain in the case. One, Harry Derbyshire, is a former Whittaker employee; the other, George C. Hunter, is a current Whittaker employee. They are being sued on tort theories and, as such, are not involved in this arbitration issue.[1]

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[1]Under applicable law the presence of these two individual defendants has no bearing upon Whittaker's federal right to arbitration. *C. Itoh & Co. (America) Inc. v. Jordan Intern Co.*, 552 F.2d 1224, 1231 (7th Cir. 1977); *Al-Haddad Bros. Enterprises, Inc. v. M. S. Agapi*, 551 F.Supp. 956, 959 (D. Del. 1981).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeal of the State of California, reported at 169 Cal.App.3d 969 [215 Cal.Rptr. 536] (1985), appears in the appendix hereto as Appendix A. The order of the California Supreme Court denying Whittaker's petition for review appears in the appendix hereto as Appendix B. The decision of the Superior Court of the State of California in and for the County of Los Angeles, not reported, appears in the appendix hereto as Appendix C.

JURISDICTION

The opinion of the Court of Appeal of the State of California was filed on July 1, 1985. A timely petition for review by the California Supreme Court was denied on October 3, 1985, and this petition for certiorari was filed within 90 days of that date. *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 [44 S.Ct. 11, 68 L.Ed. 132] (1923). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. Section 1:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. Section 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any

part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Wilder was an employee of Whittaker in Los Angeles, California from December, 1960 to July, 1979 when, at her request, she was offered a choice of three positions at Whittaker's Tawam Hospital project, located in Al Ain, Abu Dhabi, United Arab Emirates. Wilder accepted the position of Travel Supervisor. Her job duties involved arranging travel for employees of Whittaker's Tawam Hospital project and meeting and greeting new employees. During the course of her employment she also authored articles about travel which appeared in a newsletter published by the Tawam Hospital project.

Before leaving for the United Arab Emirates, Wilder signed an employment agreement which incorporated, by reference, an Assignment Policy. Paragraph 21 of the Assignment Policy expressly provided for arbitration of "any and all controversies or claims" which relate to Wilder's employment.[2] The

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[2]Wilder contends that the lower courts found as a matter of fact that Wilder never agreed to arbitrate. That contention is totally unsupported by the record as well as by applicable law.

The essence of this contention stems from the Court of Appeal's decision in Wilder I wherein it states that "Wilder never agreed to arbitrate controversies concerning her employment contract. . . ." (Appendix E at E21) The trial court in Wilder II based its entire decision upon that language, construing it as a holding and not dictum. With all due respect to both courts, the fact is that the trial court in Wilder I *never found* as a matter of fact that Wilder had not agreed to arbitration. All that the trial court in Wilder I found was:

1. the contract was "adhesive in nature"; and,
2. that it would be unduly oppressive or unconscion-

arbitration clause provides for the hearing to occur in Geneva, Switzerland, in accordance with the rules of procedure of the International Chamber of Commerce, and for the laws of the United Arab Emirates to apply.[3]

Approximately one year after Wilder had been employed at the Tawam Hospital project, she authored an article for the Tawam Hospital project newsletter on travel to Cyprus which included advise on how to travel from Cyprus to the "Holy Land," with specific references to Haifa, Jerusalem and Bethlehem. Almost immediately after the article was published, the director of the Tawam Hospital project, Peter Frick, received a telephone call from Abdullah Haddad, the liaison between the project and the presidential court of the United Arab Emirates, informing him that the United Arab

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able to enforce it because:

a. the site of the hearing was Geneva, Switzerland;
b. the laws of the United Arab Emirates governed; and
c. Wilder was neither informed of these provisions nor were they within her reasonable expectations.

(Appendix D)

[3]Though the arbitration clause specifies the laws of the United Arab Emirates as the governing law, the majority of other Whittaker overseas employment agreements specify California law as the governing law. Accordingly, Whittaker has expressed a willingness to use California law for resolution of the underlying dispute. Choice of law should, therefore, not be an issue since Wilder is relying upon substantive California law.

Geneva, Switzerland was selected because (i) employees were hired from the world over, (ii) it is accessible to all persons and is considered to be a neutral site, and (iii) it is the headquarters of the International Labor Organization and, thus, a source of competent arbitrators with knowledge of international employment problems.

The rules of procedure of the International Chamber of Commerce were selected because of their neutrality and wide acceptance.

Emirates Security Department was investigating Wilder's article and had been making inquiries about Wilder, who she was and why she had been "advertising" travel to Israel.

Frick met with Wilder, told her that he was concerned for her safety if she remained in the United Arab Emirates, and showed her a letter from Haddad. The letter accused Wilder of being a Zionist agent and asserted that her article was an insult to the government of the United Arab Emirates.

Wilder returned to the United States and met with Whittaker's Executive Vice-President, Harry Derbyshire. Wilder told Derbyshire that, in hindsight, she should not have written the article about travel to the Holy Land. Derbyshire told Wilder that there was no suitable position available for her. The job Wilder had held before leaving for the Tawam Hospital project had previously been filled.

Derbyshire offered to assist Wilder in finding other employment and gave her a desk and phone at Whittaker's offices. Wilder was given $6,204.70 pay in-lieu-of-notice, plus an additional $3,839.81 termination pay in recognition of her service with Whittaker. Whittaker also paid Wilder's living expenses for one month while she looked for a residence and a job.[4]

Wilder attempted to secure other employment until the end of October when she left Los Angeles for a month's vacation in Europe. She thereafter returned to San Francisco where she succeeded in finding employment in February, 1981.[5]

On June 8, 1981 Wilder commenced suit against Whittaker and a number of its employees. The essence of her suit against Whittaker is for wrongful termination, breach of contract,

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[4]Whittaker expects Wilder, as part of her opposition, to assert a litany of charges of wrongdoing against Whittaker. Suffice to say that apart from those charges being denied by Whittaker, they are irrelevant to the arbitration issues herein.

[5]Whittaker has learned that Wilder voluntarily left that job in 1982 for another job, and that she recently became unemployed.

discrimination on account of her religion (Judaism) and intentional infliction of emotional distress. The essence of her suit against the employees is for intentional infliction of emotional distress.

When Whittaker was first served, it sought to compel arbitration pursuant to California law. No federal right to arbitration was raised. On March 22, 1982, the Superior Court denied the request for arbitration. A copy of the Superior Court's order appears in the appendix hereto as Appendix D.

Whittaker appealed the denial of its request for arbitration, and on September 30, 1983 the Court of Appeal, in an unpublished opinion, affirmed the Superior Court's order ("Wilder I"). A copy of that opinion appears in the appendix hereto as Appendix E. A petition for review by the California Supreme Court was denied on January 4, 1984. A copy of that order appears in the appendix hereto as Appendix F.

Shortly thereafter Whittaker moved in the Superior Court to compel arbitration pursuant to federal law. On May 8, 1984, the Superior Court denied Whittaker's motion to compel arbitration pursuant to federal law solely on the ground that the prior opinion of the Court of Appeal denying arbitration on state grounds was the law of the case.

Whittaker appealed that order and, on July 1, 1985, the Court of Appeal affirmed the Superior Court's order ("Wilder II") on the grounds of (i) law of the case, (ii) inapplicability of the federal Arbitration Act, 9 U.S.C. Sections 1 *et seq.*, and (iii) unconscionability of the contract because it was deemed to be a contract of adhesion under state law.[6]

Arbitration with respect to Whittaker's hospital projects in the Middle East is extremely important to Whittaker.

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[6]To the extent Wilder may raise issues of waiver or estoppel in her opposition to this petition, those issues are irrelevant since neither the Superior Court nor the Court of Appeal considered those issues. They also lack merit under federal law. *Lubrizol Intern., S.A. v. M/V Stolt Argobay*, 562 F.Supp. 565, 573 (S.D.N.Y. 1982).

Thousands of persons from the world over were employed in these projects.[7] A standardized remedy for resolving employment disputes arising out of such employment is essential. Otherwise, Whittaker would be at the mercy of suit wherever a disgruntled employee chose to sue.

Every other court, both state and federal, which has considered the type of arbitration clause involved herein, has found the arbitration remedy enforceable. (See discussion Part I, *infra.*) Only in this case has a different result been reached.

One of Whittaker's objectives in seeking arbitration cannot now be achieved, to wit, an expeditious resolution without incurring significant discovery expense. Other objectives, however, are still obtainable; namely, a private as opposed to a public forum for resolution, the likelihood of earlier finality because of the limited grounds which exist for challenging arbitration awards, and an overall speedier resolution.[8]

REASONS FOR GRANTING THE WRIT

Whittaker's petition should be granted pursuant to Rule 17.1(b), Supreme Court Rules for the following reasons:

1. The decision of the Court of Appeal in Wilder II regarding the purview of the federal Arbitration Act conflicts with decisions of federal courts of appeals.

2. The decision of the Court of Appeal in Wilder II affirming denial of consideration of the merits of a motion

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[7]Whittaker operated hospitals in the United Arab Emirates, Saudi Arabia and North Yemen. The overwhelming majority of the employees were not citizens of the United States.

[8]Trial is now scheduled to begin on April 4, 1986. However, in light of the backlog of cases awaiting trial in the Los Angeles Superior Court system, it is expected that trial will not actually commence until sometime in late May or early June, 1986. The trial will be by jury and is estimated to take two to three weeks.

to compel arbitration pursuant to federal law because of a prior denial of a motion to compel arbitration pursuant to state law conflicts with a decision of a federal court of appeals.

The petition should also be granted pursuant to Rule 17.1(c), Supreme Court Rules for the following reasons:

1. The decision of the Court of Appeal in Wilder II that the law of the case, to wit, no right to arbitration under state law, precludes consideration of a claim for arbitration under federal law conflicts with applicable decisions of this Court.

2. The decision of the Court of Appeal in Wilder II that the merits of a motion to compel arbitration pursuant to federal law need not be addressed when a prior motion to compel arbitration pursuant to state law was denied is an important question of federal law which has not been, but should be, settled by this Court, especially since there are conflicting decisions of federal courts of appeals on this precise issue.

I.

AN ARBITRATION CLAUSE IS WITHIN THE PURVIEW OF THE FEDERAL ARBITRATION ACT WHEN CONTAINED WITHIN A WRITTEN EMPLOYMENT AGREEMENT BETWEEN A DOMESTIC CORPORATION AND A UNITED STATES CITIZEN PROVIDING FOR EMPLOYMENT IN A FOREIGN COUNTRY

To date only the Court of Appeal in Wilder II has construed the type of arbitration clause involved herein as "not within the purview of the Federal Arbitration Act." Not one authority is cited by the Court of Appeal for that conclusion. Rather, its conclusion rests upon a broad construction of the worker exclusion found in 9 U.S.C. Section 1. That provision excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged

in foreign or interstate com..erce" from the purview of the federal Arbitration Act.

The error in the Court of Appeal's interpretation, however, is that it failed to follow the vast majority of pertinent federal authority which construes the 9 U.S.C. Section 1 worker exception narrowly and limits it to workers actually employed in the transportation industries.[9] *See e.g., Miller Brewing v. Brewery Wkrs Local v. No. 9., Etc.*, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. den. ___ U.S. ___ [105 S.Ct. 1194, ___ L.Ed.2d ___]; *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Bernhardt v. Polygraphic Company of America*, 218 F.2d 948, 951-952 (2d Cir. 1955), *rev'd on other grounds* 350 U.S. 198 [100 L.Ed. 199, 76 S.Ct. 273] (1956). As for *United States Electrical R. & M. Wkrs. v. Miller Metal Prod.*, 215 F.2d 221, 223-224 (4th Cir. 1954), which is indirectly relied upon by the Court of Appeal for its conclusion, that case is of dubious validity in light of overwhelming contrary authority. Moreover, that case has been questioned. See *Pizzuto v. Hollis Motor Transit Co.*, 409 F.Supp. 427, 428-429 (E.D. Va. 1976).

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[9]Subsequent to the Court of Appeal's decision in Wilder II, another decision of the Court of Appeal rejected the Wilder II broad construction of 9 U.S.C. Section 1. In *Tonetti v. Shirley*, 173 Cal.App.3d 1144, 1148 [___Cal.Rptr.___] (1985), the Court of Appeal referenced Wilder II in a "cf" footnote (*id.*, at 1148, n. 2) and stated:

> Tonetti argues federal law does not apply to this case because his contract of employment is exempt from the Act under section 1, which states: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. Section 1.) We disagree.
>
> Many federal courts of appeal have held this exclusionary clause applicable only to workers directly engaged in the channels of interstate commerce, i.e., workers employed in the transporation industries. (Citations omitted.)

In addition to the above authorities, every other court, both in and out of California, which has considered the enforceability of this type of arbitration clause in Whittaker's contracts has enforced it. In this regard the following decisions were presented to the Court of Appeal and are a part of the record:

1. Chambers & Matson v. Whittaker Corporation, et al., Los Angeles Superior Court, No. C253 2191;

2. Todd v. Whittaker Corporation, Madera County Superior Court, No. 23233;

3. Merrill v. Whittaker Corporation, United States District Court, D. Mass. No. 81-0315-F;

4. Hoffman v. Whittaker Corporation, United States District Court, N.D. Cal. No. CV-84-6316.[10]

Copies of these orders appear in the appendix hereto as Appendices G-J.

Subsequent to the July 1, 1985 Court of Appeal's opinion, additional decisions were made by another federal district court also enforcing this type of arbitration clause. Those decisions occurred in the case of Walsh et al. v. Whittaker Corporation, et al., United States District Court, W.D. Wash. No. 689-1353D. Copies of those decisions appear in the appendix hereto as Appendices K and L.[11].

In light of this consistent and overwhelming authority, the interpretation of 9 U.S.C. Section 1 by the Court of Appeal in Wilder II must be rejected. Wilder's job was not akin to that of seamen, railroad employees, or similar employees who are directly engaged in the actual movement of persons and goods in the transportation industries. Wilder's job, to the

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[10]Hoffman has appealed on the question of whether the trial court should have ordered a jury trial on whether an agreement to arbitrate exists.

[11]Plaintiffs have appealed on the ground of whether their tort claims should have been excluded from the purview of arbitration.

extent it did not involve meeting and greeting new employees, was akin to that of a travel agent who merely makes the arrangements for persons to travel. Under the above authorities, travel agents would not be considered to be within the scope of 9 U.S.C. Section 1.

II.

WHITTAKER'S INITIAL UNSUCCESSFUL ATTEMPT TO SECURE ARBITRATION PURSUANT TO STATE LAW MAY NOT, BECAUSE OF THE STATE DOCTRINE OF LAW OF THE CASE, PRECLUDE WHITTAKER'S RIGHT TO ARBITRATION UNDER FEDERAL LAW

Given the fact that the arbitration agreement involved herein is within the purview of the federal Arbitration Act, 9 U.S.C. Sections 1 *et seq.*, the issue is whether Wilder I's initial denial of enforcement of the arbitration agreement because of state law can operate to bar consideration of a motion to compel arbitration under federal law. The Court of Appeal in Wilder II answered that question in the affirmative, holding (a) that the law of the case precluded any consideration on the merits of Whittaker's motion to compel arbitration pursuant to federal law, and (b) that the law of the case regarding the adhesive nature of the contract as well as its unconscionability under state law was in any event binding on Whittaker's motion despite its being based upon federal law.[12] Neither of these positions can be sustained.

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[12]When Whittaker initially raised the issue of its right to arbitration pursuant to federal law, the Superior Court acknowledged that while "some of the reasoning of the District Court of Appeal in this case [Wilder I] might falter and even fail under the reasoning in Southland v. Keating, the law of the case is that plaintiff never agreed to arbitrate her dispute with defendant." (Appendix D) A review of the opinions by both the Superior Court and the Court of Appeal in Wilder I (Appendices D and E) will show that neither court ever "found" that there was no agreement to arbitrate. Rather, the holding was that an agreement in writing existed, but it was unenforceable under California law.

A. The State Doctrine Of Law Of The Case Cannot Preclude Consideration Of Important Federal Questions

This Court has held in no uncertain terms that the state doctrine of law of the case cannot preclude consideration of important federal questions. In *Hathorn v. Lovorn*, 457 U.S. 255 [102 S.Ct. 2421, 2426, 72 L.Ed.2d 824] (1982), the Court stated:

> Before addressing the federal question raised by the Mississippi Supreme Court's decision, we must consider respondents' assertion that the lower court decision rests upon two adequate and independent state grounds. First, respondents contend that the state court's reliance upon the law of the case bars review of the federal question. It has long been established, however, that "[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . ." *Reece v. Georgia*, 350 U.S. 85, 87, 76 S.Ct. 167, 169, 100 L.Ed. 77 (1955). See also *Davis v. O'Hara*, 266 U.S. 314, 321, 45 S.Ct. 104, 107, 69 L.Ed.303 (1924); *United States v. Denver & Rio Grande R. Co.*, 191 U.S. 84, 93, 24 S.Ct. 33, 86, 48 L.Ed. 106 (1903). Because we cannot review a state court judgment until it is final, a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration.

In analogous situations, two federal courts of appeals have considered the issue of a subsequent attempt to secure arbitration under federal law after an initial attempt to secure arbitration under state law was denied. The two circuits reached opposite results. In *Southern Bell Telephone & T. Co. v. Louisiana Power & L. Co.*, 309 F.2d 181 (5th Cir.

1962), a request for arbitration under state law was first made by Southern Bell in a state court proceeding. The state trial court denied the request. The Louisiana Court of Appeal affirmed the denial and the Louisiana Supreme Court denied a hearing. That scenario is identical to what occurred herein with respect to Wilder I.

After the Louisiana Supreme Court denied a hearing, Southern Bell filed suit in federal court, on the basis of diversity jurisdiction, and requested arbitration pursuant to federal law. The district court denied the request upon the ground, *inter alia*, that the policy against relitigation of issues and principles of comity precludes consideration of the question pursuant to federal law on its merits. The Court of Appeals for the Fifth Circuit reversed and remanded for consideration of Southern Bell's request for arbitration on its merits. Wilder II conflicts with that decision.

In *Towers, Perrin, Forsters & Crosby, Inc. v. Brown*, 732 F.2d 345 (3rd Cir. 1984), the Court of Appeals for the Third Circuit reached a contrary result and expressly declined to follow *Southern Bell*. *Id.* at 350.

In *Towers*, suit was originally commenced in the California Supreme Court. Towers sought to compel arbitration pursuant to California law. Its request was denied. Towers appealed and, while the appeal was pending, initiated suit in federal district court to compel arbitration pursuant to federal law. Before any decision was had in the federal court suit, the California Court of Appeal affirmed the state trial court's denial of Towers' request for arbitration and the California Supreme Court denied a petition for review. Thereafter the federal district court granted Towers' request for arbitration.

On appeal, the Third Circuit Court of Appeals reversed the order for arbitration by predicting that the denial of arbitration by the state court would be considered, under California law, to have *res judicata* effect and thus be entitled to "full faith and credit" pursuant to 28 U.S.C. Section 1738. The Court of Appeals also noted that Towers had made no

attempt to raise a federal right to arbitrate in the state court proceedings. 732 F.2d at 351, n. 3. As indicated above, *Towers* recognized that *Southern Bell* was contrary, but declined to follow it.

In this case, Whittaker has raised the issue of a federal right to arbitrate in the same state court proceeding. Law of the case, not *res judicata,* was used by the trial court to refrain from ruling on the merits of the issue. The Court of Appeal in Wilder II held with respect to whether its first decision was *res judicata* or law of the case, that it "need not determine this most interesting question, as we perceive no manifest injustice in the trial court's application of the doctrine of law of the case." (Appendix A, at A6)

While we expect Wilder to argue *res judicata* in opposition to Whittaker's petition, California law is clear that *res judicata* is inapplicable herein.[13]

Given the importance of arbitration under federal law, whether state law of the case concepts can operate to preclude consideration on the merits of a motion to compel arbitration pursuant to federal law is an important federal question which is deserving of consideration by this Court.

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[13]A fundamental prerequisite for the application of *res judicata* or collateral estoppel is the existence of a prior "final judgment" in another action. *American Enterprise, Inc. v. Van Winkle,* 39 Cal.2d 210, 218, [246 P.2d 935] (1952); *Bernhard v. Bank of America,* 19 Cal.2d 807, 813, [122 P.2d 892] (1942); *Pillsbury v. Superior Court,* 8 Cal.2d 469, 472, [66 P.2d 149] (1937). No matter what Wilder says or argues, the undisputed fact is that there is no final judgment in this matter, nor any adjudication, final or otherwise, that Whittaker does not have a federal right to arbitrate. Thus, as stated in *Pillsbury:*

> "The petitioner seeks to apply the tests inherent in the doctrine of *res judicata.* Such a plea where appropriate must be affirmatively relied upon and presents questions for the determination of the trial court in the exercise of its jurisdiction. (*Baird v. Superior Court,* 204 Cal. 408 [268 Pac.640].) Ordinarily that

B. The Court of Appeal Erroneously Applied State Standards for Reviewing Arbitration Provisions to Whittaker's Motion Under the Federal Arbitration Act

As noted above, in Wilder II the Court of Appeal held that the trial court's finding that the arbitration provision at issue was unconscionable and adhesive under state law was the law of the case applicable to the motion under federal law. This is incorrect for three reasons: (1) the inappropriateness of the use of law of the case to deny a federal right, as explained in the prior section; (2) federal substantive law, not state law, governs arbitration provisions subject to the federal Arbitration Act;[14] and (3) after Wilder II was decided, the California Supreme Court held that the state law concepts

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> doctrine is applicable to issues which have been determined by final judgment in another action. It is not effective when there has been as yet no final judgment on all the issues between the parties. Here the decision of the District Court of Appeal is the law of the case and governs its subsequent course on the undetermined issues insofar as the *same* facts and *principles of law* are concerned. But it is not an adjudication in the same sense as a final judgment in the action."

8 Cal.2d at 472. [Emphasis added.]

An additional reason for the inapplicability of the doctrines of *res judicata* and collateral estoppel is that they do not apply to decisions on motions. *McFaddin v. Dietz*, 115 Cal. 694, 697, [47 Pac. 686] (1897); *Tiffany Productions, Inc. v. Superior Court*, 131 Cal.App. 729, 733-734, [22 P.2d 275] (1933); *Johnson v. Nelson*, 43 Cal.App. 113, 115, [184 Pac. 501] (1919). Wilder I involved the denial of a motion to compel arbitration.

[14]In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ___U.S.___ [105 S.Ct. 3346, 3354, ___L.Ed.2d___] (1985) decided after the Court of Appeal's decision in Wilder II, the Court stated:

> "Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'

of unconscionability and adhesion contract which can preclude arbitration under state law have no bearing upon a right to arbitration under federal law. *Dryer v. Los Angeles Rams*, ___Cal.3d___ [___P.2d___, ___Cal.Rptr.___] (No. LA 31889, 12/5/85) (1985)[15]

In light of *Dryer*, a procedure was now available for Whittaker to seek a reconsideration by the Court of Appeal or to renew a request for hearing by the California Supreme Court, it would have first utilized such procedure. However, no such procedure exists. Therefore, only this Court is now in a position to allow for Whittaker's motion to compel arbitration pursuant to federal law to be considered on its merits pursuant to applicable federal substantive law. At a minimum, this Court should remand to the Court of Appeal for reconsideration in light of *Dryer*.

Two very recent decisions, one by the California Supreme Court and one by the California Court of Appeal, both decided subsequent to the Court of Appeal's decision in Wilder II, have expressly recognized this principle of federal law. *Dryer v. Los Angeles Rams*, ___Cal.3d___ [___P.2d___, ___Cal.Rptr.___] (No. LA 31889, 12/5/85); *Tonetti v. Shirley*, 173 Cal.App.3d 1144, 1147-1148, [___Cal.Rptr.___] (1985).

[15]Underlying the Court of Appeal's decision in Wilder II is its determination in Wilder I that the arbitration agreement involved herein is "a contract of adhesion" and thus, "unconscionable" pursuant to *Graham v. Scissor Tail, Inc.*, 28 Cal.3d 807 [623 P.2d 165, 171 Cal.Rptr. 604] (1981). The Court of Appeal concluded Wilder II by stating: "Under the doctrine of law of the case, this determination is binding in any event." (Appendix A, at A8) *Dryer*, however, holds that those concepts as set forth in *Graham* are inapplicable to requests for arbitration pursuant to federal law. As stated by the California Supreme Court:

> In short, when deciding whether to compel or deny arbitration, federal courts confine their inquiry to a few threshold issues; they do not consider the substance of the grieving party's claims, nor do they scrutinize the agreed-upon arbitration procedures for general fairness. Thus, although federal law does not expressly preclude the exercise of state powers with regard to arbitration procedures, we believe that to apply the reasoning of *Graham* in this context would frustrate rather than

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted, and that the matter be set for hearing or remanded to the Court of Appeal for reconsideration in light of subsequent authority.

Respectfully submitted,

RONALD M. GREENBERG, ESQ.
RONALD M. GREENBERG,
A Professional Corporation

PAUL, HASTINGS, JANOFSKY & WALKER

By: _____

RONALD M. GREENBERG,

Attorney for Petitioner
WHITTAKER CORPORATION

> further the goals of national labor policy. After resolving the threshold question of arbitrability, the trial court should compel arbitration under the collective bargaining agreement—without regard to the possibility that arbitration machinery might run afoul of the *Graham* standards.

That same procedure applies with equal force to requests to compel arbitration under the federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, as there is nothing ". . . which requires different treatment for labor agreements than for commercial or other agreements providing for arbitration of disputes." *Paramount Bag Mfg. Co., Inc. v. Rubberized Nov., Etc., Loc.*, 353 F.Supp.1138, 1139 (E.D.N.Y. 1973). *Cf. Chattanooga Mailers v. Chattanooga News-Free Press*, 524 F.2d 1305, 1315 (6th Cir. 1975).

The Court of Appeal's reliance in Wilder II upon its prior determinations in Wilder I of state law concepts of unconscionability and adhesion pursuant to *Graham* cannot, therefore, support the refusal to consider Whittaker's motion to compel arbitration pursuant to federal law on its merits.

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL - SECOND DIST.
F I L E D
JUL 1 1985
CLAY R[illegible], JR. Clerk
Deputy Clerk

VIVIAN WILDER, Plaintiff and Respondent, v. WHITTAKER CORPORATION, a California corporation, et al., Defendants and Appellants.	2d Civ. B008667 (Super.Ct.No. C 370 458)

APPEAL from an order of the Superior Court of Los Angeles County. Irving A. Shimer, Judge. Affirmed.

Gibson, Dunn & Crutcher, Kenneth W. Anderson, Amy Branaman and Ronald M. Greenberg for Defendants and Appellants.

Weisz and Weisz, Richard A. Weisz and Michael S. Klein for Plaintiff and Respondent.

Defendant Whittaker Corporation ("Whittaker") appeals from an order denying a petition to compel arbitration and a motion for an order staying proceedings. We affirm the order.

FACTS

In 1982, Whittaker filed a petition to compel arbitration of a dispute arising out of its employment contract with Vivian Wilder. The petition was denied by the trial court, whose decision was affirmed by this court in an unpublished opinion filed September 30, 1983 (2d Civ. No. 65676). On January 4, 1984, the California Supreme Court denied Whittaker's petition for hearing.

Shortly thereafter, the United States Supreme Court issued its opinion in *Southland Corp.* v. *Keating*, ___ U.S. ___ [79 L.Ed.2d 1, 104 S.Ct. 852], which Whittaker contends is apposite. Whittaker filed a second petition to compel arbitration, asserting for the first time a right to arbitrate under the federal Arbitration Act, 9 U.S.C. § 1 *et seq.* This appeal is taken from the trial court's order denying the second petition.

ISSUES

Whittaker contends the trial court erred in determining that the doctrine of "law of the case" precludes Whittaker from asserting a federal right to arbitrate. Wilder contends the appeal is frivolous and seeks sanctions.

DISCUSSION

Under the doctrine of "law of the case", "a matter adjudicated on a prior appeal normally will not be relitigated on a subsequent appeal in the same case. [Citations.]" (*Davies* v. *Krasna* (1975) 14 Cal.3d 502, 507.) The doctrine is generally applied upon retrial of

a case following reversal of the judgment on appeal, and "deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal:* The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 633, p. 4552.) (Emphasis in original.)

The doctrine applies even though in its subsequent consideration the trial or appellate court may be of the opinion that the former decision is erroneous. (*Ibid.*) "Only where to apply the law of the case results in manifest injustice (6 Witkin, Cal. Procedure, *supra,* Appeal, § 650) or there has been an intervening change in the law (6 Witkin, Cal. Procedure, *supra,* Appeal, § 651) may the trial court employ a different principle." (*Puritan Leasing Co.* v. *Superior Court* (1977) 76 Cal.App.3d 140, 146; *Selby Constructors* v. *McCarthy* (1979) 91 Cal.App.3d 517, 522.)

Whittaker contends the decision in *Southland Corp.* v. *Keating, supra,* ___ U.S. ___ [79 L.Ed.2d 1, 104 S.Ct. 852] constitutes an intervening change in the law so as to render the doctrine of law of the case inapplicable. In *Southland,* the California Supreme Court denied arbitration of a dispute, based on the court's interpretation of the state Franchise Investment Law to require judicial consideration of claims brought thereunder. The state court held that the statute was not in conflict with the federal Arbitration Act pursuant to which the arbitration agreement had been made.

The United States Supreme Court found that in enacting the federal Arbitration Act, Congress created a substantive rule applicable in state as well as federal

courts, and that its intent in so doing was "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (79 L.Ed.2d at p. 15, 104 S.Ct. at p. 861.) Therefore, the court held that the applicable section of the California Franchise Investment Law violated the supremacy clause of the federal constitution.

The applicability of the federal Arbitration Act to state proceedings involving commerce as defined in the Act is not a new concept in this state. (See, e.g., *Lounge-A-Round* v. *GCM Mills, Inc.* (1980) 109 Cal.App.3d 190, 194, and cases there cited.) Moreover, *Southland* involved only one petition to compel arbitration, and the federal ground therefor was urged in the state court. *Southland* did not decide that a federal right to arbitrate that is not urged in the state court will nonetheless be enforced.

In *Towers, Perrin, Forster & Crosby, Inc.* v. *Brown* (3d Cir. 1984) 732 F.2d 345, employees who purchased shares of stock in the employer corporation pursuant to a Shareholder's Agreement providing that any dispute thereunder would be subject to arbitration, filed an action in the state superior court seeking, inter alia, a declaratory judgment that certain noncompetition and forfeiture provisions of the agreement were unenforceable. The employer filed a petition to compel arbitration pursuant to the California Arbitration Act (Code Civ. Proc., § 1280 *et seq.*). The petition was denied and the employer appealed. While the appeal was pending, the employer filed a petition in the federal District Court to compel arbitration pursuant to the federal Arbitration Act. While the employer's motion for summary judgment was pending in the federal action, the California Court of Appeal affirmed the order denying arbitration. Thereafter, the federal court granted the petition filed

in that court. The Court of Appeals for the Third Circuit held that the employer's federal claim was barred by res judicata. (732 F.2d at p. 351.) The Court distinguished the situation in *Towers* from that in *Southland,* in that the employer in *Towers* "never asserted its rights under the federal Arbitration Act in the California litigation, so it cannot be said that the supremacy clause was violated." (732 F.2d at p. 351, fn. 3.)

The *Towers* court recognized that no California decision "has determined whether an order denying arbitration is entitled to preclusive effect in subsequent proceedings." (732 F.2d at p. 348, but see *Lounge-A-Round* v. *GCM Mills, Inc., supra,* 109 Cal.App.3d 190, 198-199.)[1] The court predicted that the California Supreme Court would hold that the order in that case was a final order, and that res judicata applied, because (1) "[w]hat little case law there is on point indicates that the decision that a dispute is or is not arbitrable is conclusive of that issue", (732 F.2d at p. 348) (2) an order denying arbitration "meets the standard of finality for res judicata that the judgment be 'free from attack on appeal,' " (*id.,* at p. 349) i.e., the order, having been upheld on direct appeal, "could not be reviewed again on appeal from a determination of the merits of the dispute" (*ibid.*), and (3) the "one final judgment" rule does not preclude the order from being res judicata.

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[1]In *Lounge-A-Round,* plaintiff filed an action in the Los Angeles Superior Court. Defendant then filed a petition to compel arbitration in the United States District Court for the Southern District of New York. This petition was dismissed with prejudice pursuant to a stipulation of the parties and the court's own deliberations. Thereafter, defendant filed a motion to compel arbitration in the pending superior court action. On appeal from the order denying the motion, this court found meritless defendant's contention that the motion was not precluded by the doctrine of res judicata.

"There were essentially two separate actions in the California trial court: [the] special proceeding to compel arbitration, and [the] action for declaratory judgment and damages" (*ibid.*), and the finality of the order denying arbitration "is not undermined by the fact that the outcome of the dispute itself must be resolved by a separate action", whether the order be considered a final judgment or an interlocutory order. (*Ibid.*)

In the present case, both petitions were filed in but a single action, indicating that the doctrine of law of the case applies. The general rule is that the doctrine does not extend to points of law which might have been but were not raised on the prior appeal (*Wood* v. *Elling Corp.* (1977) 20 Cal.3d 353, 360; *Estate of Horman* (1971) 5 Cal.3d 62, 73), or to points not necessary to the prior disposition (*Gyerman* v. *United States Lines Co.* (1972) 7 Cal.3d 488, 498). Thus, Whittaker contends the trial court erred in refusing to consider whether the subject dispute was arbitrable under the federal law, and that our prior determination that there was no agreement to arbitrate is not binding.

It is equally true that each petition instituted a separate special proceeding, complete unto itself, and the first of these proceedings resulted in an order which was affirmed on appeal, suggesting that the more stringent preclusive effect of the doctrine of res judicata should apply. (See *Towers, Perrin, Forster & Crosby, Inc.* v. *Brown, supra,* 732 F.2d 345, 349-350.)

We need not determine this most interesting question, as we perceived no manifest injustice in the trial court's application of the doctrine of law of the case. Moreover, we are persuaded that the subject agreement is not within the purview of the federal Arbitration Act, and that it would not in any event be enforceable thereunder.

The federal Arbitration Act provides for enforcement of agreements to arbitrate disputes arising out of contracts evidencing transactions involving "commerce". (9 U.S.C. § 2.) In defining "commerce" Congress declared that " 'commerce', as herein defined, means commerce among the several States or with foreign nations, . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1; *Southland Corp.* v. *Keating, supra,* ___ U.S. ___ [79 L.Ed.2d at p. 12, fn. 5, 104 S.Ct. at p. 858].)[2]

In the instant case, Wilder was employed as supervisor of office services at Whittaker's corporate headquarters in Los Angeles, California, from December 13, 1969 to July 1979, when she accepted the position of "Travel Supervisor," and was transferred to Al Ain, Abu Dhabi, United Arab Emirates, where she worked on Whittaker's Tawam Hospital Project. The arbitration clause that Whittaker seeks to enforce appears in an assignment policy incorporated into a written employment contract signed by Wilder and dated July 6, 1979. The clause provides for resolution of employment disputes "in accordance with [Whittaker's] internal complaint and grievance procedures" and, that failing, arbitration "in accordance with the rules of the International Chamber of Commerce, Paris, France." The clause provides that "[a]ll arbitration proceedings shall be held in Geneva,

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[2]Some federal courts have held that the exclusion set forth in 9 U.S.C. § 1 is limited to workers employed in the transportation industries (e.g., *Miller Brewing* v. *Brewery Wkrs. Local U. No. 9, Etc.* (7th Cir. 1984) 739 F.2d 1159, 1162 U.S. Cert. den. 105 S.Ct. 1194); others have held that the exclusion is not so limited (e.g., *United Electrical R. & M. Wkrs.* v. *Miller Metal Prod.* (4th Cir. 1954) 215 F.2d 221, 223-224).

Switzerland," and that "[t]he laws of the United Arab Emirates shall apply to and govern" the agreement.

We are satisfied the contract herein was a contract of employment of a worker engaged in foreign commerce, and is therefor not within the purview of the federal Arbitration Act.

Finally, we note that the federal Arbitration Act provides for enforcement of agreements to arbitrate "except upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The federal cases recognize the unenforceability of unconscionable contracts. (See e.g. *Pittsfield Weaving Co.* v. *Grove Textiles* (1981) 430 A.2d 638.) A contract of adhesion is such an unconscionable contract. We determined, in our prior opinion, that the subject contract was a contract of adhesion. Under the doctrine of law of the case, this determination is binding in any event.

While Whittaker's contentions are meritless, it does not appear that the appeal was frivolous or taken solely for delay. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 26(a).) We therefor deny the sanctions requested by Wilder.

DECISION

The order is affirmed.

CERTIFIED FOR PUBLICATION

DANIELSON, J.

We concur:

KLEIN, P.J.

ARABIAN, J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL - SECOND DIST.
FILED
JUL 24 1985
CLAY ROBBINS, JR. Clerk
Deputy Clerk

VIVIAN WILDER,

Plaintiff and Respondent,

v.

WHITTAKER CORPORATION, a California corporation, et al.,

Defendants and Appellants.

2d Civ. B008667
(Super.Ct.No. C 370 458)

ORDER CORRECTING OPINION

THE COURT:

It is hereby ordered that the slip opinion in the above case which was filed on July 1, 1985, is corrected in the following particular only:

1. On page nine of the slip opinion in the fourth line of the second paragraph, change "1969" to read "1960".

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, No. B008667

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
OCT 3 - 1985
LAURENCE P. GILL, Clerk
Deputy

WILDER, Respondent,

v.

WHITTAKER CORPORATION, Appellant.

Appellant's petition for review DENIED.

Bird

Chief Justice

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 83

May 8, 1984

Irving A. Shimer JUDGE | J. Schmuki DEPUTY CLERK

JUDGE PRO TEM | R Lewis Reporter

Deputy Sheriff | (Parties and counsel checked if present)

C 370 458

Vivian Wilder
vs
Whittaker Corp., etc., et al,

Counsel for Plaintiff
Richard Weisz

Counsel for Defendant
Gibson, Dunn& Crutcher
Ronald Greenberg

NATURE OF PROCEEDINGS.

Motion of defendants for order staying proceedings and Petition to compel arbitration

Deny motion and petition. While some of the reasoning of the District Court of Appeal in this case might falter and even fail under the reasoning in Southland v. Keating, the law of this case is that plaintiff never agreed to arbitrate her dispute with defendant. This court is bound by such determination and has no power to disagree

and conclude otherwise. Thus, even if the arbitration agreement is enforceable, contrary to the prior ruling in this case, it has been held herein, as the appellate court elected to decide this case on multiple grounds that plaintiff "never agreed to arbitrate controversies concerning her employment contract and cannot now be compelled to accept arbitration." Page 27 of the unpublished opinion.

☐ IT IS STIPULATED that Commissioner ..... may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO/FROM DEPARTMENT .....

☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR
☐ No Appearance
☐ By stipulation

☐ On court's own motion
☐ At request of moving party

☐ CONTINUED TO .....

IN DEPT. ..... AT ..... 1224 ... AM PM

☐ On court's own motion
☐ REQUEST OF
☐ TRO to remain in full force and effect
☐ Stip. to be filed

☐ Moving party
☐ On oral/written stipulation
☐ Respondent(s)
☐ TRO dissolved
☐ OSC DISCHARGED

☐ NOTICE:
☐ Waived ☐ By moving party X By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED)

☐ DECREE IS SIGNED AND FILED.

MINUTES ENTERED 15 83
May 8, 1984 DEPT.
COUNTY CLERK

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 82

DATE March 22, 1982

HONORABLE Leon Thompson JUDGE	G. Regalado DEPUTY CLERK _____
HONORABLE JUDGE PRO TEM Deputy Sheriff	_____ Reporter (Parties and counsel checked if present)

C 370 458

Vivian Wilder
vs
Whittaker Corp., et al

Counsel for
Plaintiff
Richard A. Weisz
Michael S. Klein

Counsel for
Defendant
Kenneth W. Anderson

NATURE OF PROCEEDINGS.

ORDER

In these matters deemed submitted as of this date, the court rules: The court has read and considered all papers on file in connection with each motion.

A)The court finds, based on such review, that the assignment policy of defendant, Whittaker Corp.,

which comprises part of the employment contract between plaintiff and said defendant, made and entered on 7-6-79 is adhesive in nature as defined in Neal v. State Farm Ins. (1961) 188 C.A. 2d 690, 694, and adopted and approved in Graham v. Scissor-Tail, Inc., (1981) 28 Cal. 3d 807, 817; that it would be unduly oppresive or "unconscionable to enforce the arbitration provision of said employment contract, which requires the site of the hearing to be in Geneva, Switzerland, and laws of United Arab Emirates to givern [sic] its interpretation and performance, when the plaintiff was neither informed of these provisions nor the same fall within the reasonable expectations of plaintiff. Based on the foregoing findings, the petition to compel arbitration is denied, and the motion to stay proceedings is denied. Plaintiff to give notice.

C) Demurrer off calendar without prejudice. The court on its own motion strikes the complaint for failure to comply with rules 1A,1B,1C, Law & Motion Manual. 30 days to amend. In amending, bear in mind the objections made this date. Moving party to give notice.

D) Motion to quash service of process is denied without prejudice on the ground that the court needs to see the First Amended Complaint. Moving party to give notice.

A copy of this order delivered to counsel as indicated above via U. S. Mail this date.

☐ IT IS STIPULATED that Commissioner ..... may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO/FROM DEPARTMENT .....

☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR ☐ On court's own motion
☐ No Appearance ☐ At request of moving party
☐ By stipulation

☐ CONTINUED TO .....

IN DEPT. ..... AT ..... 455 ... AM PM

☐ On court's own motion ☐ Moving party
☐ REQUEST OF ☐ On oral/written stipulation
☐ TRO to remain in full force and effect ☐ Respondent(s)
☐ TRO dissolved
☐ Stip. to be filed ☐ OSC DISCHARGED

☐ NOTICE:

☐ Waived ☐ By moving party ☐ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED)

☐ DECREE IS SIGNED AND FILED.

DEPT. 82

MINUTES ENTERED
3-22-82
COUNTY CLERK

APPENDIX E

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

VIVIAN WILDER, Plaintiff and Respondent, v. WHITTAKER CORPORATION, et al., Defendants and Appellants.	)	2d Civil No. 65676 (Super. Ct. No. C 370458)

APPEAL from an order of the Superior Court of Los Angeles County. Leon Thompson, Judge. Affirmed.

Gibson, Dunn & Crutcher and Kenneth W. Anderson and Amy Branaman for Defendants and Appellants.

Weisz & Weisz and Richard A. Weisz and Michael S. Klein for Plaintiff and Respondent.

STATEMENT OF CASE

Defendant, Whittaker Corporation (Whittaker), appeals from that portion of the order made by the superior court which denies the defendant's petition to compel arbitration and denies the defendant's motion

to stay proceedings. The foregoing petition and motion was filed in an action brought by Vivian Wilder, a former employee of Whittaker.

An order dismissing or denying a petition to compel arbitration is appealable pursuant to California Code of Civil Procedure section 1294. The order denying the motion to stay proceedings is not appealable itself; however, it may be reviewed on the appeal from the order denying the petition to compel arbitration. (Code Civ. Proc., § 1294.2.) (*Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385, 388.)

FACTS

From December 13, 1960, to July 1979, Wilder was employed as supervisor of office services at Whittaker's corporate headquarters in Los Angeles, California. On or about July 6, 1979, Wilder accepted a different position with Whittaker. This new position, titled "Travel Supervisor," involved Wilder's transfer to Al Ain, Abu Dhabi, United Arab Emirates (U.A.E.), where Wilder was to work on Whittaker's Tawam Hospital Project (Hospital). In April of 1979 Whittaker had entered into a contractual arrangement with the government of Abu Dhabi whereby Whittaker was to assume responsibility for recruiting medical and nonmedical personnel to staff, manage, and operate the Hospital for approximately $108 million.

When Wilder accepted her position at the Hospital, she signed a written employment contract dated July 6, 1979, which incorporated by reference a 13-page printed "Assignment Policy" setting forth comprehensive and detailed terms of employment, including an "Arbitration" section.

Part of Wilder's duties as travel supervisor entailed the writing of travel articles for the company newsletter,

"A 'Salam Tawam" (newsletter). Wilder submitted the articles she wrote to the editor of the newsletter, Mrs. Rae Forte, also a Whittaker employee, as required by established Whittaker procedures. Wilder's articles then normally underwent a review, editing, approval, and authorization for publication.

On July 13, 1980, Wilder's employment at the Hospital was terminated for cause because of the publication of an article she had written which made reference to the availability of a vacation trip from Cyprus to "the Holy Land."

In her declaration in opposition to Whittaker's petition to compel arbitration and motion to stay, Wilder states that she had submitted a draft of the article in question to Forte for review, editing, approval, and authorization. Without objection or any further communication or consultation between Forte and Wilder, the article was published and distributed.

A letter of termination was attached as an exhibit to Wilder's declaration. The letter was written on Whittaker Corporation letterhead, signed by Peter C. Frick, project director, and dated July 13, 1980. In it Frick stated that the cause for Wilder's termination was the fact that she wrote and offered for publication the article encouraging Hospital employees to visit "the Holy Land"; that such a recommendation was "highly insulting to our host country, the United Arab Emirates, and to its citizens, it is also clear violation of U.A.E. laws prohibiting persons employed or residing in the U.A.E. from visiting the aforementioned area"; that the "laws of the U.A.E. and the sentiments of its citizens as they relate to this subject" had "been made quite clear" to Wilder "and to every other Tawam Hospital employee," and that the "fact that the article was

erroneously published without the normal censorship review required by Tawam Hospital management" did not act to mitigate Wilder's "actions in writing it and offering it for publication." Frick had also told Wilder, on the previous day, that Whittaker had received a complaint about the article's reference to "the Holy Land."

On July 16, 1980, Wilder left Abu Dhabi and returned to Los Angeles. Wilder reported to Whittaker headquarters in Los Angeles on July 18, 1980, where she was informed that "no suitable position was available" for her with Whittaker, and she was requested to return to headquarters on July 21, 1980, to finalize her termination. On July 21 Wilder received a second discharge slip, the first having been given to her upon her discharge from her position in Abu Dhabi. Both discharge slips were attached as exhibits to Wilder's declaration.

According to Wilder's declaration of November 24, 1981, she was assured prior to her departure for Abu Dhabi, in 1979, by Ronald Moss, a vice-president of Whittaker, that upon her return she "would have continued employment" with Whittaker. Moss also made a declaration dated December 22, 1981, in which he states that he did not at any time give Wilder assurances of continued employment with Whittaker when she returned from Abu Dhabi, and says that he "stated the exact opposite . . . . [that he] could not give any guarantees because [he] did not know how long she would be gone and whether or not there would be openings if she came back."

On June 9, 1981, Wilder filed a complaint with 13 causes of action for damages for wrongful discharge, discrimination, breach of contract, violation of duty of

good faith and fair dealing, and intentional infliction of emotional distress in the superior court of Los Angeles against Whittaker and several officers and employees of Whittaker individually and in their capacity as officers and employees of Whittaker.

The first through ninth causes of action allege that Wilder was wrongfully discharged. The causes of action delineate five potential bases for the wrongful discharge claim which are alleged separately and in various combinations.

The first basis for the wrongful discharge cause of action arises from statements, allegedly made to Wilder by Whittaker employees upon Wilder's termination, to the effect that there was no longer any suitable employment opportunity for her at Whittaker. Wilder alleges that this statement is untrue, and even if true, it does not constitute good cause for Wilder's termination.

The second basis for the wrongful discharge claim arises from the article which Wilder wrote and submitted for publication which made reference to the availability of a vacation to "the Holy Land." Wilder alleges that her termination was in wrongful retaliation for her writing of this article despite the fact that she submitted a draft of the article for review and authorization prior to publication pursuant to established procedures; and therefore, Whittaker knew or should have known of the contents of said article prior to publication.

The third basis for the wrongful discharge cause of action was that her termination allegedly occurred as a result of the fact that Wilder is a member of the Jewish religion.

The fourth basis was that there was no cause for her termination. The plaintiff alleges that her termination

was wrongful since the written employment contract incorporates by reference an assignment policy which contains a provision (20.2) stating, inter alia, that "[t]he company reserves the right to terminate the employee's employment for 'cause' without prior notice . . . ." The plaintiff alleges that this clause expressly and impliedly forecloses Whittaker's right to terminate Wilder except for cause.

The fifth and final alleged basis for wrongful discharge is breach of contract, both breach of the "Termination for Cause" provision and the contract as a whole.

The tenth cause of action alleges that Whittaker discriminated against Wilder in violation of California Constitution, Article I, Section 8, and Government Code, section 12900 et seq., since her termination was based on the fact that Wilder was Jewish.

The eleventh cause of action alleges that Whittaker violated the covenant of good faith and fair dealing which the employment contract between Wilder and Whittaker contains, as implied by law. Wilder states that Whittaker violated its duty of good faith and fair dealing by terminating her employment: (a) because there was no suitable employment opportunity for her within the company; or (b) in retaliation for Wilder's writing of the travel article; or (c) on the basis of Wilder's Jewish religion.

The twelfth cause of action is based on breach of contract. The written employment contract between Wilder and Whittaker contains a provision which states that the term of Wilder's employment was "of indefinite duration," and also that either Wilder or Whittaker could terminate the employment "upon 90 calendar days prior written notice to the other party. . . ." Wilder did not receive any notice, and therefore alleges that the employment contract was breached.

In the thirteenth and final cause of action, Wilder alleges that the termination of her employment: (a) for the stated reason that there was no suitable employment opportunity for her at Whittaker; or (b) in retaliation for her travel article; or (c) on basis of Wilder's Jewish religion constituted outrageous, intentional, and malicious conduct, with the purpose of causing Wilder to suffer humiliation, mental anguish, and emotional and physical distress.

On September 22, 1981, Whittaker filed a demurrer to the complaint, a petition to compel arbitration, a motion to stay proceeding, and a motion to quash summons.

The basis of Whittaker's petition to compel arbitration is a provision in the printed 13-page assignment policy (section 21), which is incorporated into the written employment contract, entitled "Arbitration." This section provides, in pertinent part, that

> "[t]he employee and the Company agree that the procedures established by this Section 21 shall constitute the sole and exclusive procedures for resolving any and all controversies and claims which arise out of the employee's employment hereunder, or arise out of the breach of any of the terms or conditions set forth herein . . . or are in any other way related to or arise out of employee's employment with the Company. . . . If any such controversy or claim is asserted during the term of the employee's employment, the matter shall be resolved in accordance with the Company's internal complaint and grievance procedures established from time to time by the Company. If the employee or the Company desire to

> appeal any final decision rendered pursuant to the Company's internal complaint and grievance procedures, the matter shall be settled exclusively by arbitration in accordance with the procedures hereinafter established in this Section 21 . . . . All Arbitration pursuant to this Section 21 shall be in accordance with the rules of the International Chamber of Commerce, Paris, France, then in effect, by a single arbitrator, ... All arbitration proceedings shall be held in Geneva, Switzerland, ... Any such arbitration award shall be conclusive and binding upon the employee and the Company and shall not be appealable. The laws of the United Arab Emirates shall apply to and govern this Assignment Policy and the Employment Contract and their interpretation and performance. The arbitrators may award attorney's fees and other out-of-pocket expenses to the party which prevails in any such arbitration. Each party to any such arbitration shall bear its own expenses pending the awarding thereof to the party which prevails in any such arbitration."

Whittaker claims that the controversy involved arises out of the aforementioned employment contract; and therefore, Wilder must arbitrate the controversy in the manner provided in Section 21.

On December 3, 1981, Wilder filed an opposition to defendants' demurrer, a response, and an opposition to the petition to compel arbitration and motion to stay proceedings, and an opposition to defendants' motion to quash service of process. In opposition to the petition to compel arbitration and motion to stay the proceed-

ings, Wilder filed her declaration dated November 24, 1981.

Wilder contends that Whittaker waived any right to compel arbitration since Whittaker initiated the controversy by terminating Wilder's employment without itself submitting the matter to, or informing Wilder of, an internal complaint or grievance procedure or arbitration procedure. Furthermore, Wilder asserts that even if Whittaker has not waived its right to compel arbitration, the instant arbitration provision is adhesive and the procedures for arbitration provided are contrary to the reasonable expectations of the parties or are unduly oppressive and unconscionable and are, therefore, unenforceable. Primarily, Wilder objects to two portions of the arbitration section. The first portion provides that the arbitration be held in Geneva, Switzerland (particularly since "each party is to bear its own expenses"). In her declaration, she says that she is a single woman of modest income and, since her termination from Whittaker, has obtained full time employment in San Francisco, California. She would be unable to leave her job and incur the expenses necessary for her or her attorneys to travel to and arbitrate in Geneva, Switzerland. The second provision of the arbitration clause to which Wilder objects provides that the "laws of the United Arab Emirates shall apply to and govern this assignment policy and the employment contract and their interpretation and performance."

Wilder further states in her declaration that

> "When I accepted the position [at the Hospital] in Ms. Herman's office, Ms. Herman gave me a written employment agreement to sign. There was very little discussion about the written documents and after a cursory look at

> the employment contract, I signed it as indicated. [¶] At no time did Ms. Herman or any other Whittaker Corp. employee point out Section 21 of the Assignment Policy [the arbitration section] or explain its terms to me. Nor did anyone mention anything about or make me aware of the existence of any company internal complaint or grievance procedure associated with said Section 21. [¶] No Whittaker Corp. employee said anything about any of these particular items or anything about the procedure, if any, including arbitration, for resolving any controversies that might arise during or after the course of my employment."

Ellen Herman, an employee of Whittaker, stated in her declaration that it was the standard practice for recruiters to review, in summary form, each and every term and condition set forth in the assignment policy with the hired overseas employees. Herman, who signed Wilder's employment contract for Whittaker, stated that she has no recollection of meeting with Wilder. Whittaker also asserts, through the declarations of two of its employees, Ellen Herman and Ronald Moss, that prior to Wilder's transfer to Abu Dhabi, Wilder held the position of office services supervisor, where part of her responsibilities involved overseeing the corporate print shop, which printed the assignment policies containing the arbitration clause in question, thus implying that Wilder was or should have been familiar with said arbitration clause.

Through the declaration of Alan D. Jacobson, dated September 18, 1981, Whittaker defends its use of the instant arbitration clause. Mr. Jacobson declares that the "reasons for the inclusion of the subject arbitration

clause in the employment agreements connected with the government of Abu Dhabi hospital project include the following: (a) to provide consistency in the settlement of disputes where otherwise a multitude of jurisdictions would be involved due to the international character of the project and recruitment" (15% of the employees are from North America, 35% from Europe, and the remaining 50% are from the rest of the world, with the majority from the middle east); "(b) to provide a neutral site considering the location of the project itself and the areas from which employees are drawn and considering that most witnesses and documentary evidence will be found in the Emirate of Abu Dhabi; and (c) to provide a relatively quick forum where otherwise it may take years to get to trial in many jurisdictions. Jacobson averred that the latter point is especially important because the substantial turnover in personnel (inherent in foreign site projects) may cause witnesses to become unavailable if disputes are not expeditiously resolved. Geneva, Switzerland was selected as the location because it is traditionally a neutral country and is the headquarters for the International Labor Organization where competent arbitrators in employment matters can be found."

On March 22, 1982, the court made and entered its order denying both the petition to compel arbitration and the motion to stay. Whittaker appealed from that portion thereof which reads:

> "... that the assignment policy of defendant, Whittaker, Corp., which comprises part of the employment contract between plaintiff and said defendant, made and entered on 7-6-79, is adhesive in nature as defined in *Neal* v. *State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, and adopted and approved in *Graham* v.

Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 817; that it would be unduly oppressive or unconscionable to enforce the arbitration provision of said employment contract, which requires the site of the hearing to be in Geneva, Switzerland, and laws of the United Arab Emirates to govern its interpretation and performance, when the plaintiff was neither informed of these provisions nor the same fall within the reasonable expectations of plaintiff. Based on the foregoing findings, the petition to compel arbitration is denied, and the motion to stay proceedings is denied."

CONTENTIONS

Appellant Whittaker contends that viewed in light of California's public policy favoring arbitration over litigation as a method of settling employment disputes, (1) the instant employment contract is not a contract of adhesion, since Wilder voluntarily chose to enter into it; (2) even if found to be a contract of adhesion, the terms of the contract, including the arbitration clause, are fully enforceable; (3) the arbitration clause is enforceable because its provisions regarding forum selection (Geneva, Switzerland) and governing law (laws of the United Arab Emirates) are not unconscionable nor contrary to Wilder's reasonable expectations; and (4) even if aforementioned provisions of the arbitration clause are unconscionable and unenforceable, the proper action is to strike the objectionable provisions and order arbitration.

DISCUSSION

"It has long been the public policy of [California] to favor arbitration over litigation as a means of settling disputes because it is expeditious, avoids the delays of

litigation, and relieves the court congestion." (*Wheeler* v. *St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 355; *Madden* v. *Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706, 707.)

However, arbitration is a matter of contract (*Pacific Investment Co.* v. *Townsend* (1976) 58 Cal.App.3d 1, 9), and the existence of this strong public policy favoring arbitration is tempered by the fact that persons are not to be compelled "to accept arbitration of controversies which they have not agreed to arbitrate. . . ." (*Freeman* v. *State Farm Mutual Automobile Insurance Company* (1975) 14 Cal.3d 473, 481.) Thus, in considering whether the policy favoring arbitration is to be applied, it must be determined that the agreement to arbitrate was "openly and fairly entered into." (*Wheeler* v. *St. Joseph Hospital, supra,* 63 Cal.App.3d 345, 356.) Once this is established, it must be found that the agreement to arbitrate operates "within some minimum levels of integrity." (*Hines* v. *Anchor Motor* (1976) 424 U.S. 554, 571; *Graham* v. *Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 825.)

What these "minimum levels of integrity" are must be determined largely on a "case by case basis" bearing in mind "that the 'contractual machinery' of the parties is intended by them to serve as a substitute for . . . formal judicial proceedings." (*Graham* v. *Scissor-Tail, Inc., supra,* at p. 825.) The minimum levels of integrity are not met if the arbitration agreement provides either: (a) that a party, or someone so identified with the party as to be in fact the party, is named as the arbitrator(s); or (b) that the rules under which the arbitration is to proceed "deny a party the fair opportunity to present his side of the dispute." (*Id.* at p. 825-826.)

Wilder claims that the agreement to arbitrate was not openly and fairly entered into since it is a contract of adhesion; that it contained provisions regarding forum selection and governing law that would be unduly oppressive or unconscionable to enforce; that neither Mrs. Herman nor any other Whittaker employee informed her of the provisions of the arbitration section of the "assignment policy" portion of her employment contract; and that the provisions relating to forum selection and choice of law were beyond her reasonable expectations, thus rendering the agreement unenforceable. Whittaker urged that the employment contract, including the agreement to arbitrate, is not a contract of adhesion and that the provisions within the arbitration portion of which Wilder complains, regarding forum selection and governing law, are not unconscionable, nor are they contrary to Wilder's reasonable expectations. In the trial court's order denying the petition to compel arbitration, the trial court agreed with Wilder's position.

"The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal* v. *State Farm Ins. Cos., supra,* 188 Cal.App.2d 690, 694; *Graham* v. *Scissor-Tail, Inc., supra,* 28 Cal.3d 807, 817.) A contract is not, however, rendered unenforceable merely because it is a contract of adhesion. "[A] contract of adhesion is fully enforceable according to its terms . . . unless . . . such a contract or provision . . . does not fall within the reasonable expectations of the weaker or 'adhering' party . . (-SOUTH-)h] contract or provision, even if consistent with the reasonable expectations of the parties, . . . is unduly oppressive or 'unconscionable.' " (*Graham* v.

Scissor-Tail, Inc., supra, 28 Cal.3d 807, 819-820.) Furthermore, when presented with a situation involving an arbitration clause within a contract of adhesion our Supreme Court has held that "In the absence of some special element of unfair advantage, . . . arbitration is generally considered to be a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves. [Citation] For these reasons, the fact that provision for arbitration is contained in a contract of adhesion will not, of itself, render the provision unenforceable." (*Keating* v. *Superior Court* (1982) 31 Cal.3d 584, 595.)

The Employment Contract
Is A Contract Of Adhesion

The employment contract which is the subject of the case at bench possesses all of the characteristics of a contract of adhesion. The contract is in two parts, the first being a four-page "offer of employment," having filled-in blanks which particularize the contract only as to a few basics, including point of hire (Los Angeles), job title, salary, catagory of hire (F), amount of household effects allowance, terms of employment (indefinite duration), and three filled-in blanks relating to arrival and departure dates. It concludes with signature by a Whittaker employee and the signature of the employee accepting the offer of employment. The contract does not even specify the name of the employee except for her signature.

The second part of the contract is the "Whittaker Assignment Policy," consisting of a cover sheet, a one-page table of contents, and 13 pages of printed detail. It is wholly impersonal, the employee is not named

therein, and the whole consists of standardized "boiler plate" provisions covering the terms and conditions of employment running from "Definitions" to "Miscellaneous Provisions." It contains 22 sections, many of which have several subsections. Section 21, Arbitration, is on the next to the last page. There are no spaces or other provisions in the printed form to accommodate change or variations. In sum, the employment contract is the epitome of a standardized form contract which offered employment on essentially a "take it or leave it" basis without offering the prospective employee an opportunity to bargain. (See *Wheeler* v. *St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 356-357.) It is apparent that Wilder, in accepting the employment, had no options other than "to adhere to the contract or reject it." Wilder's bargaining strength in relation to Whittaker's was minimal or none at all. (See *Hope* v. *Superior Court* (1981) 122 Cal.App.3d 147, 153.) Accordingly, we conclude, as did the trial court, that the employment contract is a contract of adhesion.

The Employment Contract Is Not Enforceable.

In *Scissor-Tail,* our Supreme Court observed that while the adhesive character of a contract will not itself preclude enforcement

> "... there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. (Citations and footnote omitted.) The second—a principle of equity applicable to all contracts generally—is that a contract

> or provision, even if consistent with the resonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable." (*Graham* v. *Scissor-Tail, Inc., supra,* 28 Cal.3d 807, 820.)

The provisions of the arbitration section of the employment contract did not fall within the reasonable expectations of the employee.

The trial court correctly found that Wilder was neither informed of the provisions of the arbitration section of the employment contract nor did they fall within her reasonable expectations.

Wilder's declaration in opposition to Whittaker's motion to compel arbitration clearly states that she was not informed of the terms of the arbitration section. The declaration of Ellen Herman in support of the petition to compel arbitration does not contradict Wilder's declaration. It states only that the declarant had no recollection of meeting with Wilder to review the contract with her but that it was the standard practice of the recruiter to do so. Herman states that she knew Wilder. We have noted that Herman signed the contract on behalf of Whittaker Corporation. Wilder's declaration as to this fact was not otherwise contradicted.

There was substantial and sufficient evidence to support the trial court's finding. "On appeal, the facts must be viewed in a light most favorable to respondents, and we must presume the trial court resolved in favor of respondents any factual conflict in the affidavits. (*Manson* v. *Wilcox,* 140 Cal. 206, 209 [73 P.1004].)" (*Arrieta* v. *Paine, Webber, Jackson & Curtis, Inc.* (1976) 59 Cal.App.3d 322, 329.)

The choice of forum and choice of law provisions of the arbitration section are unduly oppressive or unconscionable.

We confirm the trial court's conclusion that the terms of the arbitration section of the employment contract are unduly oppressive and unconscionable and therefore unenforceable.

Choice of Forum

Forum selection clauses in contracts have been held to be valid, in a proper case, "and may be given effect in the court's discretion in the absence of a showing that enforcement of such a clause would be unreasonable." (*Smith, Valentino & Smith, Inc.* v. *Superior Court* (1976) 17 Cal.3d 491, 496.) This tenant was extended to forum selection provisions in arbitration agreements in *New Linen* v. *Eastern Environmental Controls, Inc.* (1979) 96 Cal.App.3d 810, 817-818.) In the case at bench, it is implicit that the trial court found, and properly concluded, that it was unreasonable for the arbitration agreement to require that "All arbitration proceedings shall be held in Geneva, Switzerland, ..." No useful purpose could possibly be served by that forum selection, and it would be a crushingly burdensome and oppressive, and therefore unconscionable, requirement for the plaintiff below, Vivian Wilder, " . . . a single woman of modest income . . . . ," who is an office worker in her mid-fifties to travel from her home in California to Geneva, Switzerland, to obtain redress of her grievances in that remote and foreign forum, in a controversy with her former employer of 20 years, a California corporation. Placing such a burden on an individual such as plaintiff is not only unreasonable, but it affronts the very concept of equity.

California has an overriding public policy favoring access to its courts by resident litigants. ". . . California residents ought to be able to obtain redress for their grievances in California courts, which are maintained by the state for their benefit. [Citations.] This state is concerned with the welfare of California residents [citations omitted] and has 'a decided interest in assuring that its citizens are not denied damages because of the inconvenience or expense of bringing suit in a distant jurisdiction.' " (*Thomson* v. *Continental Ins. Co.* (1967) 66 Cal.2d 738, 742.)

Choice of Law

We also confirm the trial court's finding and conclusion that the choice of law provision of the arbitration section of the employment contract is unduly oppressive or unconscionable and therefore unenforceable.

The arbitration section of the contract mandated that "[t]he laws of the United Arab Emirates shall apply to and govern this . . . " employment contract. This provision is patently unreasonable, inequitable, and unconscionable. There is no rational justification for requiring a controversy between a California resident individual and a California corporation to be resolved by the application of the laws of the United Arab Emitates in a Swiss tribunal pursuant to the rules of the International Chamber of Commerce of Paris, France. The sum of those unique and exotic requirements, all of which are mandated by the employment contract, is to place access to justice beyond the reach of the individual employee. To honor those provisions would be to honor the denial of redress of the employee's grievances. The courts of California will not be party to that denial.

The contract, by its own terms, was executed in Los Angeles, California. It is between a California resident individual and a California corporation for which she had worked for nearly 20 years. The plaintiff's employment was terminated in Los Angeles, California.

Plaintiff has been a resident of California during much of her life and resides here now. The record is barren of any contact between her and the United Arab Emirates save for her one-year sojourn in 1979-1980. The U.A.E. has no interest in her controversy with defendant Whittaker. On the other hand, California has a great interest. The California courts have adopted the governmental interest analysis approach to choice of law problems. Under that approach,

> " . . . the courts examine the policies underlying the competing laws of the involved states to determine which states are 'interested' in having their laws applied to the issues in question. A state will have an interest in having its law applied if the policies underlying the law would be thereby advanced. When only one of two potentially concerned states has an interest in having its law applied, . . . the court simply applies the law of the only interested state [citations]." (*Ashland Chemical Co.* v. *Provence* (1982) 129 Cal.App.3d 790, 793-794.)

Our Supreme court has said:

> "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied." (*Hurtado* v. *Superior Court* (1974) 11 Cal.3d 574, 580.)

In the case at bench, as in *Ashland,* California is the only interested state. The plaintiff, defendant corporation, and most of the individual defendants are California residents. All of the parties, and the court in which the underlying action is filed, have an interest in applying California law and thus in advancing California's policies.

The Trial Court Properly Denied The Petition To Compel Arbitration.

Defendant Whittaker also urged that if the court found the arbitration clause to be unenforceable the proper action would be to strike the objectionable provisions and to order arbitration. This contention is without merit under the facts of this case.

As set forth above, the trial court properly found that Wilder neither was informed of the arbitration provisions nor did they fall within her reasonable expectations. As a consequence Wilder never agreed to arbitrate controversies concerning her employment contract and cannot now be compelled to accept arbitration. (*Freeman* v. *State Farm, supra,* 14 Cal.3d 473, 481; see also *Painters Dist. Council No. 33* v. *Moen* (1982) 128 Cal.App.3d 1032, 1037; and see Code Civ. Proc., § 1281.2.)

We also note that the arbitration section of the contract provides that any controversies which

> " . . . in any . . . way . . . arise out of the employee's employment by the Company. . . . shall be resolved in accordance with the Company's internal complaint and grievance procedures established from time to time by the Company. If the employee or the Company desire to appeal any final decision rendered

> pursuant to the Company's internal complaint and grievance procedures, the matter shall be settled exclusively by arbitration in accordance with the procedures hereinafter established . . . ."

The record reflects that Whittaker instituted the instant controversy by discharging Wilder abruptly. The record is devoid of any indication that Whittaker ever instituted, let alone completed, any action in accordance with its "internal complaint and grievance procedures." In fact, the existence of such procedures has been questioned. The contract makes clear that the requirement for arbitration applies only to an appeal from a final decision rendered pursuant to the internal complaint and grievance procedures. Thus, under the facts in the record, the case is not yet ripe for arbitration.

Lastly, we point out that plaintiff Wilder was fired by Whittaker on July 13 and July 18, 1980. No action of any kind was instituted by Whittaker to demand arbitration until May 8, 1981, two months after Wilder had filed (March 11) a complaint against Whittaker under Government Code section 12960. There is nothing in the record to permit us to conclude that Whittaker would have sought to commence arbitration proceedings if Wilder had not commenced her efforts to obtain redress of her alleged grievances. We do not need to decide, and do not decide, whether Whittaker's actions constituted a waiver of whatever rights it may have had to demand arbitration. But we are reminded that, as this court has said,

> "A party 'cannot have it both ways. [It] cannot rely on the contract [provision], when it works to [its] advantage, and repudiate it when it works to [its] disadvantage.' (*Tepper*

Realty Company v. *Mosaic Tile Company (S.D.N.Y. 1966)* 259 F.Supp. 688, 692.)" (*Lounge-A-Round* v. *GCM Mills, Inc.* (1980) 109 Cal.App.3d 190, 1977.)

Respondent has asked that sanctions be imposed, pursuant to California Rules of Court, rule 26(a), on the ground that this appeal is frivolous and taken solely for the purpose of delay. We do not find that the appeal is so utterly devoid of merit and so frivolous as to justify the imposition of sanctions, and we deny the request.

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED.

DANIELSON, J.

We concur:

KLEIN, P. J.

LUI, J.

APPENDIX F

FILED
CLERK
MAIL

AMY BRANAMAN, ESQ.
GIBSON, DUNN & CRUTCHER
333 So. Grand Avenue
Los Angeles, CA 90071

'84 JAN -6 A11 :00

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 4 1984

I have this day filed Order _____

HEARING DENIED

In re: 2 Div. *No.* 65676

VIVIAN WILDER

vs.

WHITTAKER CORPORATION, et al.

Respectfully,

Clerk

APPENDIX G

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 80

DATE JANUARY 9, 1979

HONORABLE THOMAS T. JOHNSON JUDGE	G. E. LEAR DEPUTY CLERK _____
HONORABLE JUDGE PRO TEM	_____ Reporter
Deputy Sheriff	(Parties and counsel checked if present)

C 253 219

JAMES L. CHAMBER &
GEORGE G. MATSON
vs.
WHITTAKER
CORPORATION ET AL.

Counsel for Plaintiff

Counsel for Defendant

NATURE OF PROCEEDINGS.

SUBMITTED MATTER (1-4-79) Dept. 80

This matter, in re motion of defendant to strike complaint or in the alternative to stay proceedings and Petition to compel arbitration, having been heretofore submitted on 1-4-79, the Court now makes the following ruling:

Proceedings in this matter are stayed.

Petition to compel arbitration is granted.

Moving party is to prepare orders.

All parties are notified by U. S. Mail this date.

☐ IT IS STIPULATED that Commissioner .....
may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO/FROM DEPARTMENT .....

☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR ☐ On court's own motion
☐ No Appearance ☐ At request of moving party
☐ By stipulation

☐ CONTINUED TO .....
IN DEPT. ..... AT ..... AM
PM

☐ On court's own motion ☐ Moving party
☐ REQUEST OF ☐ On oral/written stipulation
☐ TRO to remain in full force and effect ☐ Respondent(s)
☐ Stip. to be filed ☐ TRO dissolved
☐ OSC DISCHARGED

☐ NOTICE:
☐ Waived ☐ By moving party ☐ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED)

☐ DECREE IS SIGNED AND FILED.

DEPT. 80

MINUTES ENTERED

1-9-79

COUNTY CLERK

RONALD M. GREENBERG
MERRILLYN ERSKINE
10880 Wilshire Boulevard
Los Angeles, California 90024
Tele. No. (213) 475-9411

Attorneys for Defendants
Whittaker Corp. and
Whittaker Corporation

JAN 13 1979
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JAMES L. CHAMBERS AND GEORGE G. MATSON, Plaintiffs, v. WHITTAKER CORPORATION, WHITTAKER CORP., DOES 1 through 10, Inclusive, Defendants.	NO. C 253 219 ORDER COMPELLING ARBITRATION

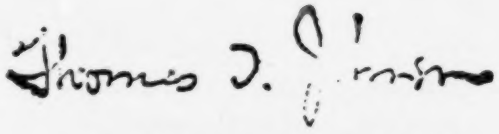
The petition of Whittaker Corporation and Whittaker Corp., for an order compelling arbitration came on regularly for hearing on January 4, 1979 in Department 80 of the above-entitled court. Petitioners appeared through their counsel Ronald M. Greenberg and respondents appeared through their counsel John Alan Cohan and Joseph L. Staats.

Due and proper notice of the hearing of the petition having been given and proof having been made to the satisfaction of the court that the petition should be granted,

IT IS ORDERED that petitioners Whittaker Corporation and Whittaker Corp., and respondents James L. Chambers and George G. Matson arbitrate the controversies existing between them in accordance with the provisions of each of their agreements dated August 26, 1977.

IT IS FURTHER ORDERED that all proceedings herein are stayed pending arbitration.

Dated: 1-18-79, 1979.



THOMAS T. JOHNSON

Judge of the Superior Court

APPENDIX H

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MADERA

JOHN TODD and GLENNA TODD,
Plaintiffs,
vs.
WHITTAKER CORPORATION a corporation DOE I to DOE XXV, inclusive.
Defendants.

No. 23233
Date Dec. 3, 1979
Present:
Hon. JACK L. HAMMERBERG, Judge
_____ Bailiff
Jan fortune Deputy Clerk
_____ Reporter

APPEARANCES

Michael A. Milnes, no appear.
Greenberg & Erskine no appear.

NATURE OF HEARING

Decision

Court orders proceedings stayed as to Glenna Todd pending arbitration.

MINUTE ORDER

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HARLEY A. MERRILL,

V. CIVIL ACTION NO. 81-0315-F

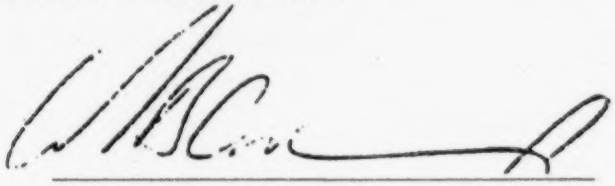
WHITTAKER CORPORATION.

ORDER ON DEFENDANT'S MOTION
FOR STAY OF ACTION PENDING ARBITRATION

COLLINS, U.S.M.

After hearing held this date, and upon a review of the file and the authorities cited by the parties, it is ORDERED that the defendant's Motion For Stay Of Action Pending Arbitration (#04, filed 5/19/82) be, and the same hereby is, ALLOWED, for the reasons stated in open court at the conclusion of the hearing.

In summary, I can find no evidence in the record which would support any action denying enforcement of the arbitration clause of the contract on the ground either (1) that the contract is one of adhesion, or (2) assuming that it is a contract of adhesion, that the clause requiring arbitration is unconscionable.



ROBERT B. COLLINGS
United States Magistrate

July 1, 1982.

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED

MAY 21 1985

JUDITH HOFFMAN,
Plaintiff,
v.
WHITTAKER CORPORATION,
Defendant.

No. C-84-6316 JPV

ORDER GRANTING PETITION TO COMPEL ARBITRATION AND STAYING PROCEEDINGS

Defendant's petition to compel arbitration and stay proceedings came on regularly before this Court on May 16, 1985, the Honorable J.P. Vukasin, Jr., presiding. Having considered the arguments of counsel, both written and oral, and being fully advised in the premises, the Court hereby GRANTS the petition, and enters the following findings:

(1) On June 15, 1982, plaintiff entered into a written contract of employment with defendant. Said contract incorporated by express reference the Assignment Policy for Employees Hired in Category A (Saudi Arabia) of June 1, 1982.

(2) Paragraph 21.0 of that Assignment Policy expressly provides that all employment disputes shall be submitted to arbitration in Geneva, Switzerland, in accordance with the rules of the International Chamber of Commerce

in Paris, France. Plaintiff was on actual or constructive notice of this provision at the time of entering into the employment contract.

(3) It is the policy of the federal courts that arbitration provisions falling within the scope of the Arbitration Act, 9 U.S.C. § 1 *et seq.* are to be given a liberal interpretation. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The arbitration clause here appears to the Court to fall within the scope of the Act.

(4) The allegations by a plaintiff that the overall contract was entered into fraudulently is a dispute which is properly subject to arbitration. *See, e.g., In re Oil Spill by Amoco Cadiz, etc.,* 659 F.2d 789 (7th Cir. 1981), *citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). However, claims of fraud in the inducement of an agreement to arbitrate raise an issue which is not subject to arbitration, but which must properly be decided by the Court. *Prima Paint, supra,* 388 U.S. at 403-404, 87 S.Ct. at 1805-1806; *see also Moseley v. Electronic & Missile Facilities,* 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed.2d 818 (1963). It is plaintiff's argument that the complaint here raises such a claim.

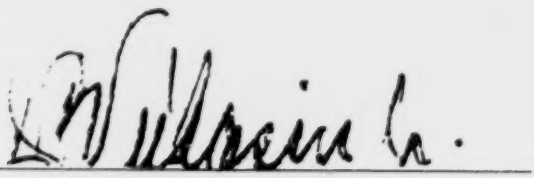
(5) The Court finds, however, that the Complaint is addressed to fraudulent inducement to enter into the contract as a whole, rather than to the specific terms of the arbitration clause. *See* Complaint, ¶¶ IV, VII, VIII, X. While the arbitration clause is mentioned in ¶ V of the Complaint, the *sine qua non* of plaintiff's allegations is that she was induced to enter into an employment agreement based on promises made by defendant which the latter had no intention of

performing. It is the purported breach of such promises by defendant, rather than the arbitration agreement, which resulted in plaintiff's alleged damages.

For these reasons, therefore, it appears to the Court that there exists good cause for granting the petition to compel arbitration and to stay the present proceedings pending arbitration of this matter. Said petition is GRANTED, and the instant proceedings STAYED.

IT IS SO ORDERED.

Dated: May 21, 1985



J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUL 23 1985

CLERK U S DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
BY DEPUTY

ROBERT C. WALSH, et al., Plaintiffs,	)	
v.	)	No. C84-1333D
WHITTAKER CORPORATION, et al., Defendants.	)	ORDER

In its order of May 3, 1985, the Court directed plaintiffs to show cause as to why this action should not be stayed pending arbitration. The Court has considered the responses submitted by counsel and now finds and rules as follows:

(1) It is undisputed that the parties entered a contract which provided for arbitration of:

> Any and all controversies or claims which arise out of employee's employment hereunder or out of the breach of any of the terms or conditions set forth herein or are in any other way related to or arise out of the employee's employment by the company.

Plaintiffs do not deny that their contract claims fall within the scope of the foregoing clause. Instead, plaintiffs contend that the presence of the clause in the contract was not negotiated between the parties and that mandatory arbitration under the circumstances of this case would be unreasonable and unfair, such that the Court should reject the arbitration alternative and proceed with the action in this forum.

(2) Plaintiffs do not assert that the mere presence of a mandatory arbitration clause in a contract is unreasonable but, instead, complain that the choice of forum clause designating Geneva, Switzerland as the location of the arbitration will effectively deprive them of a meaningful opportunity to litigate their claims. The Supreme Court has ruled that, in order to resist a choice of forum clause, the party must show that it will be so

> gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

(3) Although the Court recognizes the inconvenience faced by plaintiff Walsh in traveling from Washington to Geneva, the Court also notes that plaintiff Robertson is reportedly now living in Bahrain and that witnesses are located in Saudi Arabia, Cyprus, and Sweden. In view of the international aspects of the project in which plaintiffs agreed to participate, the Court finds that a mandatory arbitration clause designating Geneva as the forum for arbitration is not unreasonable, nor so inconvenient that plaintiffs will be deprived of their day

in court. Individuals who enter into an employment contract to perform work in another nation must accept the additional inconveniences which are involved. Accordingly, the Court will dismiss the contract claims of plaintiffs, as those claims are subject to mandatory arbitration and the Court therefore lacks jurisdiction to consider them.

(4) Plaintiffs have also asserted various tort claims and a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. Those claims relate to alleged acts of defendants which are not directly related to plaintiffs' employment. Although plaintiffs would not have suffered the alleged wrongs had they not been employed by defendants, the substance of the claims is not so closely related to the plaintiffs' employment that those claims should be arbitrated. Moreover, since plaintiffs' contract claims do not bear directly on the tort and RICO claims, those claims should be determined in this action. Accordingly, this action will not be stayed, and the plaintiffs may continue to advance their tort and RICO claims in this forum.

Therefore, the contract claims of plaintiffs are DISMISSED.

The Clerk of this Court is instructed to send copies of this Order to all counsel of record.

DATED this 22nd day of July, 1985.

/s/ Carolyn R. Dimmick

CAROLYN R. DIMMICK
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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SEP 24 1985

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

ROBERT C. WALSH, et al.,

Plaintiffs,

v.

WHITTAKER CORPORATION, et al.,

Defendants.

No. C84-1333D

ORDER

The Court has considered Defendants' Motion for Reconsideration in Light of New Authority and Plaintiffs' Memorandum in Opposition. In view of recent authority clarifying the reach of the federal Arbitration Act in international commercial transactions, this Court dismisses plaintiffs' tort and Racketeer Influenced and Corrupt Organizations Act ("RICO") claims. *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 105 S. Ct. 3346 (July 2, 1985). The claims dismissed, along with the plaintiffs' contract claims, are subject to mandatory arbitration.

The United States Supreme Court set forth a two-part test for arbitration of international commercial

claims in *Mitsubishi Motors*, 105 S. Ct. at 3354-55. First, the Court must determine if the parties agreed to arbitrate the claims. Second, the Court must consider whether legal constraints external to the parties' agreement foreclose arbitration. *Id.* at 3355. Federal statutory rights do not foreclose arbitration unless Congress has expressly provided: "Having made the bargain to arbitrate, the party should be held to it unless congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* As to pendent state claims, the *Mitsubishi* Court emphasized that the national policy favoring arbitration applies equally to state and federal courts. *Id.* at 3354. *See also Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1258 (1985).

The claims remaining in this case are brought under tort law and under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961. The wrongs alleged arose from the parties' employment relationship. The arbitration clause in their employment contract covers "any and all controversies and claims which arise out of employee's employment hereunder or out of breach of any of the terms and conditions . . . or *are in any other way related to or arise out of the employee's employment by the Company*" (emphasis added). This arbitration clause is significantly broader than the clause held to encompass federal anti-trust claims in *Mitsubishi Motors*.[1] The Court therefore rules that this arbitration

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[1]"All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." 105 S. Ct. at 3349.

clause encompasses the plaintiffs' remaining claims, thus meeting the first part of the *Mitsubishi Motors* test.

Plaintiffs' primary authority for denying arbitration of their federal statutory claims rests in large part on an analogy between RICO and antitrust laws. *S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983). *Cf. Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567-68 (N.D. Cal. 1984) (RICO claim arising from *domestic* commercial transaction stayed pending arbitration of underlying state claims). The *Mineracao* court emphasized the "cardinal doctrine" that the public interest in the enforcement of antitrust laws makes antitrust claims inappropriate for arbitration. *Id.* at 575. The court then concluded that "the general public interest in the enforcement of RICO is at least as great as the public interest in the enforcement of antitrust laws." *Id.* However, in *Mitsubishi Motors,* the United States Supreme Court concluded that antitrust laws as well as other federal statutes may continue to serve both their remedial and deterrent functions in the context of international arbitration. 105 S. Ct. at 3360.

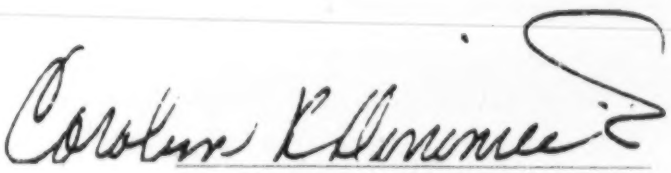
Arbitration of a federal statute might be precluded nonetheless if the second part of the *Mitsubishi Motors* test is not met. The second part requires that Congress has evinced an intent to prohibit arbitration. The *Mineracao* court *inferred* such a congressional intent. *Id.* at 575. Under *Mitsubishi Motors,* a judicial inference is not enough. This Court has been shown no evidence of congressional intent to preclude arbitration. Thus, the parties must be held to their bargain to arbitrate.

In keeping with the United States Supreme Court's "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and

sensitivity to the need of the international commercial system for predictability in the resolution of disputes,"[1] this Court GRANTS defendants' motion to dismiss all remaining claims.

The Clerk of the Court is instructed to send copies of this Order to all counsel of record.

DATED this 24th day of September, 1985.



CAROLYN R. DIMMICK
United States District Judge

[1] *Mitsubishi Motors*, 105 S. Ct. at 3355.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 31, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Richard A. Weisz, Esq.
Weisz & Weisz
1801 Century Park East
Suite 1720
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 31, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1131

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

VIVIAN WILDER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner's admitted failure to raise any claim for arbitration under the federal Arbitration Act, 9 U.S.C. §1 *et seq.*, at any stage of an earlier proceeding to compel arbitration in this case which resulted in a final appellate decision adverse to petitioner; and the lower court's express and dispositive holdings under state law that the petitioner is not entitled to relitigate this matter or to compel arbitration herein, preclude the petitioner's attempt to relitigate the matter of arbitration in this Court.

2. Whether the lower court's comments, consistent with federal law, that the federal Arbitration Act is inapplicable to the facts herein on the bases that respondent's employment was not covered by the Act, being in a "class of workers engaged in foreign or interstate commerce" (9 U.S.C. §1), and that grounds exist at law or in equity for the revocation of the subject arbitration provision, 9 U.S.C. §2, present any issue which meets this Court's established standards of substantiality for purposes of review.

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No. 85-1131

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

VIVIAN WILDER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

This Court is without jurisdiction to review the judgment of the California Court of Appeal in Wilder II [169 Cal.App.3d 969, 215 Cal.Rptr. 536 (1985)] which expressly and adequately rested on well-established and independent principles of state law which had previously determined the non-existence, invalidity, and unenforceability of any purported arbitration agreement between Ms. Wilder and the Whittaker Corporation ("Whit-

taker"), and which were applicable in Wilder II under California's equally well-established law of the case doctrine. Whittaker's admitted failure to raise any federal claim for arbitration at any stage of the proceedings in Wilder I [*Wilder v. Whittaker Corp., et al.*, 2nd Civil No. 65676, Second Appellate District, (September 30, 1983)] precludes it from relitigating the matter of arbitration in this Court under the guise of a never-before-raised claim under the federal Aribtration Act, 9 U.S.C. §1, *et seq.*

The lower court's comments that the federal Arbitration Act is inapplicable to the facts herein on the bases that the subject employment agreement is not within the purview of the federal Act, as Ms. Wilder's employment in Abu Dhabi was in a "class of workers engaged in foreign or interstate commerce" (9 U.S.C. §1); and that grounds "exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) are consistent with federal law and the purpose of the Act. This case does not involve any issue which transcends the facts of this case or which meets this Court's established standards of substantiality for purposes of review.

ARGUMENT

I

THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL IN WILDER II BECAUSE THE STATE COURT'S DECISION CLEARLY AND EXPRESSLY RESTED ON ADEQUATE INDEPENDENT NON-FEDERAL GROUNDS

Respondent Vivian Wilder respectfully submits that this Court does not have jurisdiction to review the judgment of the California Court of Appeal in Wilder II [169 Cal.App.3d 969, 215 Cal.Rptr. 536 (1985)] because the state court's decision clearly and expressly rested on adequate independent non-federal grounds. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1965); and *Michigan v. Long*, 463 U.S. 1032 (1983).

In Wilder II, the state Court of Appeal applied California's law of the case doctrine to Whittaker's second attempt to compel arbitration in this case on the basis of the appellate court's earlier decision in Wilder I [*Wilder v. Whittaker Corp., et al.*, 2nd Civil No. 65676, Second Appellate District, (September 30, 1983)] which rejected Whittaker's assertion under state law that it was entitled to arbitration herein. (Whittaker's Petition for Writ of Cert., Appendices A and E). No federal issue was raised or decided in Wilder I as Whittaker admittedly did not make any claim under the federal Arbitration Act, 9 U.S.C. §1, *et seq.*, at any stage of the proceedings therein. Wilder I became final and conclusive respecting arbitration following the California Supreme Court's denial of Whittaker's petition for hearing on January

4, 1984. (Whittaker's Petition for Writ of Cert., Appendix F.)

Thus, it is clear beyond cavil that Whittaker's second petition to compel arbitration was nothing more than an improper attempt to relitigate the decision in Wilder I under the guise of a never-before-raised claim under the federal Arbitration Act. See: *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345 (3d Cir. 1984). Indeed, both of the decisions in Wilder I and II were based on the same factual record.[1]

In Wilder I, the Court of Appeal examined Whittaker's initial attempt to compel arbitration under established state law principles governing the existence, validity, and enforceability of arbitration agreements. The court held, on multiple, alternative rulings of fact and law, that, under the facts of this case: (a) Ms. Wilder "never agreed to arbitrate controversies concerning her employment contract and cannot now be compelled to accept

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[1]The evidence in this record, and particularly the documentary evidence herein, demonstrates that Ms. Wilder's discharge had nothing to do with any purported concern for her safety. Indeed, Whittaker's safety rationale, raised for the first time in its brief in support of an unsuccessful petition for review to the California Supreme Court following the decision in Wilder I, completely fails to explain Ms. Wilder's discharge from the Corporation in Los Angeles. The facts are that in July, 1980, after 19-1/2 years of devoted service to Whittaker, Ms. Wilder was singled out and discharged from all employment with the Corporation under the false pretextual reason that there was no suitable position available for her anywhere in the Company in order to cover-up the real reasons for the discharge: (a) retaliation against Ms. Wilder for having prepared the draft of an innocuous article for an employee newsletter in Abu Dhabi that mentioned the availability of a two day vacation sea cruise from Cyprus to the "Holyland"; (b) to protect Whittaker's financial position with the Government of Abu Dhabi; and (c) to appease the anti-Jewish, anti-Israel passions of Whittaker's Abu Dhabi benefactor.

arbitration." (Whittaker's Petition for Writ of Cert., Appendix E at E21)[2]; (b) the subject arbitration provision was unilaterally imposed on her without her knowledge or consent; (c) arbitration was beyond Ms. Wilder's reasonable expectations; (d) the terms of the subject arbitration provision are unreasonable, inequitable and unconscionable; and (e) Whittaker breached the terms of the subject provision by its failure to institute or complete any action in accordance with an internal complaint and grievance procedure.[3]

These holdings were supported by the court's express reliance on applicable California state law: *Freeman v. State Farm Mutual Automobile Insurance Company,* 14 Cal.3d 473, 121 Cal.Rptr. 477, 535 P.2d 341 (1975); *Graham v. Scissor-Tail, Inc.,* 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981); *Thomson v. Continental Ins. Co.,* 66 Cal.2d 738, 59 Cal.Rptr. 101, 427 P.2d 765 (1967); *Neal v. State Farm Ins. Cos.,* 188 Cal.App.2d 690, 10 Cal.Rptr. 781 (1961); *Pacific Investment Co. v. Townsend,* 58 Cal.App.3d 1, 129 Cal.Rptr. 489 (1976); *Wheeler v. St. Joseph Hospital,* 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976); *Hope v. Superior Court,* 122 Cal.App.3d 147, 175 Cal.Rptr. 851 (1981), *cert. den.* 456 U.S. 910 (1982); *Painters Dist.*

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[2]This determination was based on abundant and substantial evidence and is not open to dispute. Nor may Whittaker seek to reargue the facts in this Court. *American Radio Assn. v. Mobile Steamship Assn.,* 419 U.S. 215 (1974).

[3]Whittaker's attempt to relitigate the record in this Court neither mentions nor disputes the lower court's determinations that arbitration was beyond Ms. Wilder's reasonable expectations; and that Whittaker breached the subject provision by failing to institute or complete any action in accordance with an internal complaint and grievance procedure. These prior rulings are also the law of this case and dispositive of Whittaker's second petition to compel arbitration.

Council No. 33 v. Moen, 128 Cal.App.3d 1032, 181 Cal.Rptr. 17 (1982); and *Ashland Chemical Co. v. Provence*, 129 Cal.App.3d 790, 181 Cal.Rptr. 340 (1982).

Thus, in Wilder II, the Court of Appeal properly framed the dispositive issue in this case in terms of California state law:

> Issues
>
> Whittaker contends the trial court erred in determining that the doctrine of "law of the case" precludes Whittaker from asserting a federal right to arbitrate. Wilder contends the appeal is frivolous and seeks sanctions. (*Wilder, supra*, 169 Cal.App.3d at 972, and Whittaker's Petition for Writ of Cert.; Appendix A at A2).

This was resolved in Ms. Wilder's favor by the Court of Appeal's express holdings under state law that: (a) the decision in Wilder I is the law of this case—with emphasis on the prior determinations that "there was no agreement to arbitrate" (*Id.* at 974 & A6), and that the subject arbitration provision is adhesive and "unconscionable" (*Id.* at 975 & A8); and (b) "we perceived no manifest injustice in the trial court's application of the doctrine of law of the case." (*Id.* at 974 & A6). The applicability of the law of the case doctrine was supported by express reliance on California state law: *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975); *Puritan Leasing Co. v. Superior Court*, 76 Cal.App.3d 140, 142 Cal.Rptr. 676 (1977); *Selby Constructors v. McCarthy*, 91 Cal.App.3d 517, 154 Cal.Rptr. 164 (1979); and 6 Witkin, California Procedure (2d ed. 1971) Appeal, §§633, 650 and 651.[4]

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[4]Indeed, both parties have relied on the decision in Wilder I (and Wilder II) by subsequently engaging in formal discovery procedures including depositions, interrogatories, requests for

While the lower court also commented correctly that the federal Arbitration Act is inapplicable to the facts *sub judice*, it is clear that these comments are dicta, or, at most, alternative holdings which were unnecessary to the appellate court's judgment in Wilder II. Consequently, this Court is without jurisdiction to review the judgment in Wilder II which expressly and adequately rested on well-established and independent principles of state law which had previously determined the non-existence, invalidity, and unenforceability of any purported arbitration agreement between Ms. Wilder and Whittaker, and which were applicable in Wilder II under California's equally well-established law of the case doctrine. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1938); and *Jankovich v. Indiana Toll Road Comm., supra.*

Moreover, Whittaker's admitted failure to raise any claim under the federal Arbitration Act in its initial petition to compel arbitration or at any stage of the proceedings in Wilder I cannot be turned to the advantage of the Whittaker Corporation. To the contrary, Whittaker's decision not to raise any federal claim in Wilder I forecloses Whittaker's attempt to disregard the adequacy of California's law of the case doctrine in Wilder II. The decision in Wilder I did not require or contemplate any subsequent or further

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identification and production of documents, and requests for admission of facts and genuineness of documents; all in preparation for a jury trial scheduled for April 4, 1986. These procedures have been time-consuming and expensive. And Ms. Wilder has been forced to seek and obtain several court orders in aid of her discovery of critically relevant facts which Whittaker has consistently refused to disclose absent said court orders. It is therefore clear that only the judicial process can adequately safeguard Ms. Wilder's right to a fair and impartial resolution of her claims and prevent Whittaker's continuing attempt to insure that her claims will never be reviewed.

proceedings regarding arbitration. Wilder I was final and conclusive respecting arbitration and left nothing further for any court to do in this regard except to insure Ms. Wilder's right to a jury trial on the merits of her action. *Towers, Perrin, Forster & Crosby, Inc. v. Brown, supra;* and *Lounge-A-Round v. GCM Mills, Inc.*, 109 Cal.App.3d 190, 166 Cal.Rptr. 920 (1980).

Whittaker's reliance on *Hathorn v. Lovorn*, 457 U.S. 255 (1982) is inapposite. In *Hathorn*, this Court held on the facts therein that it was not precluded by the Mississippi Supreme Court's assertion of its law of the case doctrine from reviewing a federal Voting Rights Act issue involved in a challenge to a state election law because: (a) the federal issue had been raised and determined in the earlier state court proceeding assertedly covered by the law of the case doctrine; and (b) the Mississippi Supreme Court's history of irregular application of its procedural rule rendered it an inadequate state ground for precluding this Court's jurisdiction. In contrast, Whittaker's admitted failure to raise any federal issue in Wilder I and the well-established nature of California's law of the case doctrine preclude any such claims in the instant case. Wilder II rested on adequate independent non-federal grounds.

II

THE LOWER COURT'S COMMENTS THAT THE FEDERAL ARBITRATION ACT IS INAPPLICABLE TO THE FACTS HEREIN WERE CORRECT AND DO NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION

The opinion in Wilder II makes clear that even considering Whittaker's claim under the federal Arbitration Act, it is meritless and insubstantial for purposes of this Court's jurisdiction. And contrary to

Whittaker's assertions, the lower court's dicta or alternative holdings concerning the inapplicability of the Act to the facts herein were based on established federal standards in keeping with the purpose of the Act.

The Court of Appeal correctly commented, on the basis of substantial evidence, that the Act's exclusion of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. §1), unquestionably applies herein. The undisputed facts established that Ms. Wilder was Whittaker's "Travel Supervisor" while employed under her written employment contract with Whittaker in Abu Dhabi. In this position, she had primary responsibility for arranging for and assisting in the travel of Whittaker's employees to and from Whittaker's health care project in Abu Dhabi. Indeed, 50% of these employees were from either North America or Europe and arranging for and assisting in their travel to and from Abu Dhabi directly involved Ms. Wilder in "foreign or interstate commerce."

Moreover, Whittaker has conceded the applicability of the Act's exclusion clause. In its efforts to show that Ms. Wilder's employment in Abu Dhabi involves "commerce" within the Act, Whittaker argued to the Court of Appeal that its hospital project in the United Arab Emirates involved world-wide travel by employees and shipment of materials from all over the world to the United Arab Emirates. If these facts evidence a transaction involving "commerce" for purposes of the Act's general coverage provision, they must also establish that Ms. Wilder, who was directly involved in said travel, was within a "class of workers engaged in foreign or interstate commerce" and is thereby excluded from coverage under the Act's own limitation. *United*

Electrical, R. & M. Wkrs. v. Miller Metal Prod., 215 F.2d 221, 224 (4th Cir. 1984).

None of the cases cited by Whittaker permit a contrary conclusion. Not one of these cases bears any factual resemblance to the facts of this case. Rather, in support of respondent's position, courts have viewed the exclusion clause as applying to "employees involved in, or closely related to the actual movement of goods in interstate commerce." *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972). And the facts established herein that Ms. Wilder, as Whittaker's Travel Supervisor in Abu Dhabi, was both closely related to and directly involved in the actual movement of people and goods in foreign commerce, i.e. she was a "worker engaged in foreign or interstate commerce."

The Court of Appeal also correctly commented that the subject arbitration provision is unenforceable under that portion of the Act which denies enforcement of arbitration provisions where grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. §2.

The determinations of fact herein established the most basic defenses to an action to enforce an alleged contract known to federal law, i.e. the failure of contract formation due to the lack of an agreement between the parties or knowing consent to the terms of the alleged contract; the invalidity of terms which are beyond a party's reasonable expectations or which are adhesive and unreasonable, inequitable or unconscionable; and, the breach of a material term by the party seeking enforcement so as to render the term sought to be enforced inapplicable and unenforceable. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363

U.S. 574 (1960); *Chandler v. Aero Mayflower Transit Company*, 374 F.2d 129 (4th Cir. 1967); and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

The propriety of the Court of Appeal's decision herein was most recently confirmed by this Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ___ 105 S.Ct. 3346, 87 L. Ed.2d 444 (July 2, 1985). In *Mitsubishi*, the Court explained that while the federal Arbitration Act was designed for the purpose of enforcing "freely negotiated" (*Id.*, 87 L. Ed.2d at 458) commercial arbitration agreements:

> Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or *overwhelming economic power* that would provide grounds 'for the revocation of any contract.' 9 U.S.C. sec. 2; see *Southland Corp.*, ___ U.S. ___, at n. 11 [citation omitted]. *Id.*, 87 L. Ed.2d at 455 (emphasis added).

The Court went on to emphasize that the Act denies enforcement to arbitration agreements, and particularly forum-selection clauses, where:

> the agreement was '(a)ffected by fraud, undue influence, or overweening bargaining power,' that 'enforcement would be unreasonable and unjust,' or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that (the resisting party) will for all practical purposes be deprived of his day in court. *Id.*, 87 L. Ed.2d at 459.

These federal standards were applied herein. The Court of Appeal properly commented on the basis of substantial evidence that the subject arbitration

provision was unilaterally imposed on Ms. Wilder by Whittaker for its own unconscionable advantage and was, therefore, unenforceable.

Whittaker's reference to *Dryer v. Los Angeles Rams*, 40 Cal.3d 406, ___ Cal.Rptr. ___, ___ P.2d ___ (No. LA 31889, December 5, 1985) is inapposite. *Dryer* neither raised nor decided any issue under the federal Arbitration Act. Rather, the case involved the federal Labor Management Relations Act, 29 U.S.C. §185(a) and the enforceability thereunder of an arbitration provision contained in the National Football League collective bargaining agreement. Neither national labor policy nor the collective bargaining agreement at issue in *Dryer* have anything to do with the instant case.

Moreover, Whittaker's reference to the trial court decisions in *Chambers & Matson v. Whittaker Corporation*, Los Angeles Superior Court, No. C253219 (January 13, 1979); *Todd v. Whittaker Corporation*, Madera County Superior Court, No. 23233 (December 3, 1979); *Merrill v. Whittaker Corporation*, U.S.D.C., Mass., No. 81-0315-F (July 1, 1982); *Hoffman v. Whittaker Corporation*, U.S.D.C., N.D.Cal., No. CU-84-6316 (May 21, 1985); and *Walsh v. Whittaker Corporation*, U.S.D.C., W.D.Wash., No. 689-1353D (July 23, 1985) does not alter the propriety of the Court of Appeal's comments herein.

None of these cases bear any factual resemblance to the instant case or involve any claim of wrongful discharge or the kind of mistreatment experienced by Ms. Wilder. Nor did any of these cases involve a comparable claim demonstrating the non-existence of an agreement to arbitrate; or the invalidity or unenforceability of the subject arbitration provision; or the inapplicability of the federal Arbitration Act to the

instant employment contract which is excluded from its coverage. Instead, all of these cases were brought by former employees who had voluntarily left their jobs in Saudi Arabia and who claimed that Whittaker had fraudulently induced them to go to Saudi Arabia or had otherwise breached its contractual obligations. That these former employees were unable to show why arbitration was inappropriate in their cases in no way affects the overwhelming factual showing made by Ms. Wilder in the instant case. Thus, where, as here, the facts show no basis on which to order arbitration, there is no public policy favoring arbitration and Ms. Wilder cannot be compelled to accept arbitration in place of her constitutional right to jury trial herein.

Therefore, the lower court's comments pertaining to the inapplicability of the Act to the facts herein are consistent with federal law and the purpose of the Act. This case does not involve any issue which transcends the facts of this case or which meets this Court's established standards of substantiality for purposes of review. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

CONCLUSION

For the foregoing reasons, Whittaker's petition for a writ of certiorari should be denied.

DATED: January 31, 1986

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 27, 1986, I served the within *Brief in Opposition to Petition for Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 27, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)